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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No.

JOE T. CAWTHORN,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable, the Chief Justice of the Supreme Court and the Associate Justices of the Supreme Court of the United States:

The petitioner above named prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit, affirming a judgment of conviction entered against the petitioner and others by the United States District Court for the Eastern District of Louisiana after a verdict by a jury (2168-71).

Opinions Below

There was no opinion in this case by the District Court. The Court of Appeals affirmed the judgment of conviction in an opinion (2191-9) which is reported in 175 F. (2d) at page 960.

The Court of Appeals denied a motion for rehearing filed by the petitioner and others, the majority writing no opinion and Hutcheson, J., dissenting in an opinion which has not been reported yet but is contained in the record at pages 2273 to 2277.

Jurisdiction

The jurisdiction of this court is invoked under Title 28, United States Code § 1254, Rule 37(b) of the Rules of Criminal Procedure and Rule 38 of the Rules of the Supreme Court of the United States.

The judgment of the Court of Appeals is dated July 18, 1949. The order of that court, denying the motions for rehearing, is dated September 23, 1949.

Statutes Involved

The statutes involved are Title 18, United States Code §§ 88, 241 and 242.

Summary Statement of the Matter Involved

The Indictment

The indictment (3-11) charges William T. Burton, James A. Noe, Marcel F. LaBranche and the petitioner, Joe T. Cawthorn, who were indicted, and Edwin H. Oliveira, Bernard R. Hughes and John Joseph Astorias, who were not indicted, with a conspiracy (1) to "endeavor" to

influence, obstruct and impede the due administration of justice in a criminal prosecution brought by the United States of America against William T. Burton, in which the latter was charged with wilfully attempting to evade his federal income taxes; (2) to influence, obstruct and impede the due administration of justice in that proceeding; (3) to defraud the United States of its governmental function of considering and deciding that case through the petit jury and of having its judicial power exercised free from obstruction and to have a determination by a jury free from improper influence and fraud (4-5).

The Issue Presented to the Jury

The issue presented to the jury in this case was simple and clearly defined: Were the defendants Burton, Noe and Cawthorn, as they contended, conducting a routine investigation of the jury panel for the purpose of ascertaining whether Burton could expect to obtain a fair trial in an income tax evasion case pending against him, or were these defendants, along with the juror LaBranche and the others named in the indictment, engaged in a criminal conspiracy, as the government contended, the object of which was to tamper with the jury?

This simple issue was closely contested. It requires no exhaustive analysis of the record to establish that there was ample basis for the existence of a reasonable doubt in the minds of the jurors who heard the evidence. On one side stood the defendant James A. Noe, a former Governor of the State of Louisiana (874) and the defendant William T. Burton who, handicapped by lack of formal education (1359) and early poverty (1361), had become a respected industrialist and banker (1361-2), and the defendant Joe T. Cawthorn, the petitioner, a young lawyer of unblemished reputation (1128-41).

Ranged against them, as the government's main witnesses, were Edwin A. Oliveira, a racetrack tout (599), who had been divorced by his first wife after four and a half months of marriage on the ground of his adultery

(596), and whose second wife also divorced him on the ground of his adultery (597); and John Joseph Astorias who had been employed as a supervising chef steward in the Roosevelt Hotel in New Orleans and had been secretly accepting kickbacks, or "commissions" as he preferred to call them, on supplies which he purchased for his employer (659-60), had failed to report any of this income in his federal tax returns (660), and whose glib perjuries before the grand jury in connection with these transactions were kept from the trial jury by an erroneous ruling of the trial court (infra, p. 22 et seq.).

As if to dramatize the reasonable doubt created by the evidence, the jury, at the end of twenty-five hours of deliberation, reported to the court its failure to agree upon a verdict (1453-4). The court thereupon gave the jury additional instructions (1454), concerning the language of which we shall have occasion to comment later. After forty-seven hours of further deliberation, making a total of seventy-two hours in all, the jury returned with a verdict acquitting the defendant James A. Noe * and convicting the defendants William T. Burton, Marcel F. LaBranche and the petitioner Joe T. Cawthorn.

We propose to demonstrate that the reasonable doubt concerning the guilt of the defendants that existed for such an extraordinary length of time in the minds of some of these jurors was overcome by prejudicial errors committed at the trial by the trial judge who decided an important question of federal criminal law in conflict with a decision of this court and in a manner "contrary to common fairness as understood by every standard of American justice and due process of law" (2277; dissent of Hutcheson, J. below) and who decided an important question of federal criminal law in conflict with decisions

* In its original charge, the court instructed the jury that it might convict one or more or all of the defendants, or that it might acquit one or more or all of them as the evidence warranted (1453). In the supplemental charge, the court reminded the jury that during its deliberations it might return a verdict with respect to any defendant as to whom it had agreed (1455).

of the Court of Appeals in other circuits. We shall demonstrate that those jurors who had held out so persistently and stubbornly for a period of seventy-two hours for a verdict of acquittal, surrendered their belief that the government had failed to establish its case against the defendants beyond a reasonable doubt only because of those errors. To establish this premise necessitates an examination of the setting in which the case was tried, the evidence presented against the petitioner and the errors committed by the courts below.

The Errors Committed by the Courts Below

1. The government called as a witness one Leon Adams who had been a member of the jury in the Burton tax trial (544). Adams testified on direct examination that the defendant LaBranche had served as a petit juror in the Burton case (544) and that LaBranche had voted not guilty during "the entire course of the deliberations" (545). On cross-examination Adams was prevented, by a ruling of the court which sustained an objection by the prosecutor, from stating how many other jurors in the Burton case voted for acquittal (545), although he testified that he remembered how other members of the jury voted (555).

The Court of Appeals, in its original opinion, approved of the District Court's limitation upon the cross-examination of the juror Adams on the authority of *Clark* v. *United States*, 289 U. S. 1 (2196-7). In his dissent from the decision of the Court of Appeals which denied defendants' petitions for rehearing, Judge Hutcheson stated (2276):

> "The *Clark* case, on which the court below relied, and on which our opinion was rested, does not support the ruling of the District Judge. It is to the contrary effect.
>
> * * * * * *
>
> Here, under the *Clark* case, *supra*, it was certainly proper to inquire how LaBranche voted. But it was certainly equally proper for defendants, on cross-examination, to prove, as bearing on the inquiry, how the other jurors voted."

2. After twenty-five hours of deliberation, the jury was called back by the trial court (1453) and given supplemental instructions, which the trial court stated (1454) had been approved by this court in the case of *Allen* v. *United States*, 164 U. S. 492. In the course of that charge, the District Court instructed the jury, among other things, that if a larger number of the panel were for a conviction, a dissenting juror

> "should consider whether a doubt in his own mind is a reasonable one, which makes no impression upon the minds of so many men, equally honest, equally intelligent with himself, and who have heard the same evidence, with the same attention, with an equal desire to arrive at the truth, and under the sanction of the same oath" (1455).

While the instructions sanctioned by this court in the *Allen* case may have been proper in that case and may be proper in many settings, we cannot believe that this court intended there to frame a set of instructions to be followed blindly by the trial court in every situation. Under the circumstances of this case which involved a charge of jury tampering, where the jury had been out for twenty-five hours prior to the supplemental charge and were confined for an additional forty-seven hours thereafter, these instructions were erroneous and highly prejudicial and created an effect never intended by this court when it decided the *Allen* case.

3. The district judge excluded the grand jury testimony of the witness Astorias which was offered by the defense to prove that Astorias, who had exculpated the defendants before the grand jury, changed his testimony at the trial because of fear of prosecution for independent crimes which he himself had committed. The trial court ruled that a witness

> "cannot be discredited or his hostility or bias shown by proving statements made by him outside the Court which do not harmonize with the statements made by

him on the witness stand until his attention has been called specifically to the former statements, with particularity as to time, place and circumstance, so that he can deny or explain them" (1355).

The Court of Appeals for the Fifth Circuit upheld this ruling (2197-8), and thus created a direct conflict with the decision of the Court of Appeals, Second Circuit, in *United States* v. *Beekman,* 155 F. (2d) 580, and the decision of the Court of Appeals for the District of Columbia in *Ewing* v. *United States,* 135 F. (2d) 633, that evidence as to the bias and interest of a witness is not collateral and that such bias or interest may be proven by extrinsic evidence independently of cross-examination.

The Setting in Which the Case Was Tried

What must be determined, of course, is the "impact" of the errors committed by the trial court on the minds of the jurors "in the total setting" of the case (*Kotteakos* v. *United States,* 328 U. S. 750, 764).

The charge that these defendants had engaged in a conspiracy to tamper with one juror in the Burton case and to endeavor to tamper with others was tried before a petit jury made up of men drawn from the same community as the panel that sat in the Burton tax evasion case which had ended in a disagreement. Judge Borah, the judge who presided over the Burton tax evasion case, presided over the trial of these defendants for conspiracy.

The jurors who sat in this case were furnished with a vivid demonstration of what could happen to a juror, in a criminal case pending in the District Court, who voted for acquittal. A government witness, who was not named in the indictment or elsewhere as a conspirator, testified in answer to the prosecutor's questions:

"Q. * * * Now Mr. Walmsley, will you please tell the jury how it happened that you discussed this case with agent Malone. A. You mean originally?

Q. Originally. A. Mr. Malone came over to my office and said that he was a federal agent and that

> Judge Borah was asking him to go into the matter pertaining to the jury trial, and he wanted to ask me for some information pertaining to same * * *.
>
> Q. When you testified and you mentioned Judge Borah's name, did this agent say anything about an investigation being conducted by the Court or anything like that? A. No, at the request of the Court * * *" (536).

Mr. Malone, the government agent, was present in court (1208) but did not take the stand.

Each juror, as he listened to the government's evidence, could not help but be impressed by the fact that one way to avoid a post-trial investigation was to vote for conviction.

When the witness Leon Adams testified that the defendant LaBranche had voted for acquittal throughout the jury's deliberations in the Burton tax case (545), and when Adams was prevented from testifying as to how the other jurors stood, the trial court not only enunciated a proposition of law which is in conflict with this court's decision in *Clark* v. *United States*, 289 U. S. 1, but erred in a manner which had a special significance in this case. If you vote for acquittal, these jurors in effect were told, your vote may be proven as an important element of the crime in a prosecution for conspiracy and you will not be permitted to defend yourself by proving that other reasonable men were of the same mind, were affected by the evidence the same way that you were and voted the same way that you did.

Again, when the jurors were brought back to the courtroom by the trial judge after twenty-five hours of inconclusive deliberation and subjected to a supplemental and a highly prejudicial charge and were then returned to the jury room and kept together for an additional forty-seven hours, their subsequent verdict must be regarded as coerced. It would take a courageous juror, indeed, in the setting of this case, to hold out for acquittal, no matter how strong his belief in the innocence of the petitioner, and no matter

how strong his belief that the government's proof failed to establish guilt beyond a reasonable doubt, in the face of the trial judge's instructions advising the minority to yield to the majority.

It is peculiar to cases of this character that the coercive force of this type of charge can affect only a minority holding out for acquittal and not a minority holding out for conviction. A juror holding out for conviction has nothing to fear. The investigatory and prosecuting forces of the government are poised to strike only at a juror holding out for acquittal. Here the jury had been given tangible proof that only those who held out for acquittal were in danger of prosecution.*

The Absence of Credible Evidence Against the Petitioner Cawthorn

1. To establish the charge in the indictment that the petitioner Cawthorn, a lawyer of integrity, character and unblemished professional standing, approached Oliveira for the purpose of persuading him to influence the defendant LaBranche's action as a juror in the Burton tax case (6) the government called only one witness—Edwin H. Oliveira—who was named as a co-conspirator but was not indicted.

Oliveira was on the petit jury panel for the May, 1945 term (557); the defendant LaBranche whom he had known for many years and with whom, he testified, he was friendly, was on the same panel (558).

Oliveira testified that on the morning of June 4, 1945, just prior to the jury being sworn for the Burton tax trial, he and LaBranche "* * * agreed then if either one

* Those who cooperated with the government did not fare too badly. Oliveira who confessed that he was guilty of tampering with a juror had not been indicted (595). Astorias who had attempted to evade a large part of his income taxes (660, 678) and had committed perjury in his testimony before the Grand Jury in connection with his income (1708) and who was named as a conspirator in this case (4, 7) likewise had never been indicted (677).

of us were picked on the jury, we would divide any money that was given to either one of us." Oliveira then added: "And I told him that I would do the contacting" (559). LaBranche was accepted as a juror but Oliveira was not (559), having been challenged by the government (579).

At this point Oliveira's testimony concerning his alleged meetings with the petitioner Cawthorn during the first week of the Burton tax trial must be followed closely since the petitioner Cawthorn subsequently proved, by unimpeachable evidence and without any contradiction or rebuttal by the government, an alibi which established that Oliveira's story was a tissue of falsehoods.

After this alleged compact with LaBranche, Oliveira testified that he met Cawthorn *accidentally* on Gravier Street in New Orleans the next afternoon, Tuesday, June 5th (561). Although he admitted that he had first met Cawthorn during election time about eighteen months before, when Cawthorn was running for office and was meeting hundreds of people in a similar fashion (560), and though he, Oliveira, admitted that Cawthorn had run into him on the street only occasionally thereafter (561), Oliveira nevertheless claimed that when he met Cawthorn accidentally on the street on June 5th, Cawthorn told him that he was sorry Oliveira did not get on the jury; that "'we wanted you on the jury'"; that after Cawthorn asked Oliveira if he "'knew anybody on the jury very well, a good friend'" and Oliveira had said that he knew LaBranche, Cawthorn asked: "'* * * do you think you could trust him, and do you think he would be interested in making some money?'" (562).

The paradox presented here of Cawthorn, a lawyer of excellent reputation, entering into a criminal conspiracy, during a chance meeting on a public thoroughfare, with a man who, on his own version of the affair, was "a total stranger" (588) could not have been lost on the jury, and the claim that Cawthorn, without pausing to ascertain or consider whether this stranger could be "trusted", inquired of him whether he thought his "friend" on the

jury could be trusted, must have taxed its credulity to the utmost.

Oliveira further testified that after this meeting with Cawthorn he saw LaBranche the next time on "the next afternoon" (562), which would be Wednesday, June 6th. Continuing his recital of what he claims occurred, he said he saw Cawthorn again on the "next afternoon. *Just by chance*" on Common Street (563), which would be Thursday, June 7th. On this occasion Cawthorn is supposed to have disclosed to Oliveira, on this public thoroughfare, the information, to be conveyed to LaBranche, that " 'there will be a thousand dollars for him and five hundred for you if he votes favorably in the acquittal of Mr. Burton' " (563).

Oliveira testified that he then went back to see LaBranche "the next day" (563), which would be June 8th. After his conversation with LaBranche, he happened to be sitting in the lobby of the St. Charles Hotel and Cawthorn passed through. He was asked to fix the date of this meeting and he replied: "I couldn't exactly state the date, whether it was the 5th or the—whether it was the 7th, 8th, 9th or 10th" (567).

Thus Oliveira testified to three meetings with Cawthorn during the first week of the Burton trial, namely, during the period from Tuesday, June 5th to Sunday, June 10th.

The Court of Appeals in its original opinion affirming the judgment of the District Court conceded with reference to the last two meetings claimed by Oliveira:

> "As to the alibi, it was very well established that Cawthorn was not in New Orleans the latter half of the first week of the trial, which lasted three weeks, and Oliveira did date two of his interviews in this period of absence * * *" (2196).

This observation by the court was compelled by testimony from unimpeachable sources, both oral and documentary, which the government made no effort to contradict or rebut, that the petitioner Cawthorn was hundreds

of miles from the place where Oliveira alleged that two of the meetings took place at the time he claimed they took place. But the Court of Appeals, in order to dispel the devastating effect on the government's case of the alibi established by Cawthorn, continued with the following statement: "• • • but when pressed he (Oliveira) said he was uncertain about the exact dates. The validity of an alibi frequently turns on mistakes in dates" (2196).

While it is true that Oliveira at the outset claimed that the alleged meeting on Common Street, which he testified was their second encounter, took place on June 7th (563) and then said it took place on June 8th (621), he immediately changed back to June 7th (621); and while he first claimed that the alleged meeting in the St. Charles Hotel lobby (the third encounter) took place on the 7th, 8th, 9th or 10th (567), on cross-examination he definitely fixed June 9th as the date (622).

The Court of Appeals singled out of pages of Oliveira's testimony on the subject of his alleged three meetings with Cawthorn (561-7; 581-90; 615-24), and out of the innumerable instances in which he fixed and repeated specific dates (id.) one chance observation of the witness in answer to a question by the prosecutor concerning the alleged meeting at the St. Charles Hotel:

> "Q. Will you state approximately what date it was? A. I couldn't exactly state the date, whether it was the 5th or the—whether it was the 7th, 8th, 9th or 10th. There may have been a day intervened, but it was either the next day or the day after these meetings. I couldn't answer what the date was" (567).

and characterized this testimony as follows: "• • • when pressed he said he was uncertain about the exact dates."

This is a plain misinterpretation of the evidence since, as we have seen, Oliveira "when pressed" fixed dates and fixed them exactly. Furthermore, Cawthorn's absence from New Orleans extended beyond *any* date fixed by the witness for their second and third meetings (1088, 1143-4, 1195, 2069).

Even if we agree with the Court of Appeals that the question of alibi "* * * was a jury question", it was a jury question so closely contested and shrouded in doubt that in this particular setting "the most extreme care and caution were necessary in order that the legal rights of the defendant should be preserved" (*Burton* v. *United States*, 196 U. S. 283, 307).

2. The witness John Joseph Astorias, called by the government, testified that he knew the defendant Cawthorn "Just from around the hotel" for about eight years (646). Beyond this the witness did not go and Cawthorn was not mentioned thereafter, directly or indirectly, in his testimony as a participant in any of the alleged events covered by his narrative.

Nevertheless the Court of Appeals observed:

> "It is specially contended for Cawthorn that the only evidence against him is that of Oliveira who was admittedly an accomplice, and that he is not corroborated but contradicted by an unimpeachable alibi showing Cawthorn was not present in New Orleans on the dates Oliveira said he approached and agreed with Cawthorn. It is well settled in the federal courts that the testimony of an accomplice though uncorroborated may be the basis of conviction if the jury under all the circumstances believes it. But in this case Oliveira was corroborated by Astorias, on the important fact that money was sent by Burton to LaBranche as Oliveira testified Cawthorn and Burton had agreed would be done" (2196).

On the other hand, if Oliveira's improbable tale of a conversation with Cawthorn when he met him "Just by chance" on Common Street on June 7th (563, 621) and the subsequent and just as improbable story of their meeting in the St. Charles Hotel on June 9th (622) are disregarded as patently perjurious in the face of the alibi which Cawthorn established, then Cawthorn did not agree that Burton would send money to LaBranche since it was at these two "meetings" that Cawthorn is supposed to have

so undertaken, and Astorias' testimony therefore corroborated nothing whatever in the case so far as this petitioner is concerned. The issue was that close and since the situation was so pregnant with doubts concerning the petitioner's guilt, as this court has had occasion to observe under somewhat similar circumstances: "A slight thing may have turned the balance against the accused • • •" (*Burton* v. *United States,* supra, at p. 307).

3. The Court of Appeals below stated:

> "Moreover Walmsley's testimony, he not being in any degree a conspirator, tends to show Cawthorn was active in a general plan to influence jurors other than LaBranche" (2196).

The impression that Walmsley's testimony made upon the jury is reflected in the acquittal of the defendant Noe. The fact that Walmsley, in relating what he alleged took place, failed to distinguish between the defendant Noe and the petitioner Cawthorn, thus presenting them as inextricably joined in this particular instance, bears out petitioner's contention that he too must have been acquitted of the Walmsley incident in the minds of the jurors.

For example, the crux of the "approach" to Walmsley (7) was a conversation which Walmsley claimed occurred at his office after the Burton tax case jury panel had been published in the newspapers but before the trial began. Walmsley testified that after a telephone call from Noe, both Noe and Cawthorn came to his office. "• • • I am not sure whether Mr. Noe or Mr. Cawthorn, one of them, • • •" had a list of prospective jurors "in their hand". "• • • they asked" him if he knew any of the names on the list (465). The witness "asked them" if it was all right "for them" to talk to him about the matter and Noe said it was, because Cawthorn was attorney of record "and he had a right to get as much information as possible pertaining to the prospective jurors" (465). The witness

then testified "they asked" him if he knew any of the jurors. He stated that he looked at the list and "told them" the ones he knew. The witness further testified:

> "And I don't know whether it was Noe or Cawthorn that wanted to know if [I knew] any of them well enough to talk to, and I told them no" (466).

After some prompting from the prosecutor:

> "Q. Anything else said at that conversation? A. Well, I don't know Mr. Noe and Mr. Cawthorn said if I could help them in the matter, it would be to my interest" (466).

After constantly referring to the fact that "• • • they said" (472) and that "Both of them talked • • •" (473) and "• • • they asked me the questions" (477), counsel for one of the defendants protested as follows:

> "The witness continually says they asked me. Two voices cannot be continuously——
> The Court: The Court will instruct the witness not to use the word 'they'.
> A. I don't recall which one of the two said that.
> The Court: Then say one or the other made the statement instead of 'they'.
> Mr. Weinstein [the prosecutor]: I would like for him to finish his answer.
> A. I said one or the other asked me if I knew them [the members of the jury panel] well enough to talk to them.
> Mr. Looney: I ask that that answer be stricken.
> The Court: The witness said he was asked by one or the other" (477).

The rejection of this evidence as to the defendant Noe, who was acquitted by the jury, must be regarded as a finding that "they", "both of them" and "one or the other" did not act as Walmsley claimed.

Walmsley, in a sworn statement to the prosecutor (479) and on his first appearance before the Grand Jury (478), had stated unequivocally that the defendant Noe and the

petitioner Cawthorn did not ask him to contact any member of the jury in an effort to influence the jury (491-2), and that he understood that what Noe and Cawthorn desired to ascertain was if Burton could get a fair trial from the prospective jurors (508). There was no relationship of friendship or prior business dealings to explain why Walmsley, when he first told his story to the government agents, and then repeated it twice under oath, completely exculpated the defendants Cawthorn and Noe. In other words, there was no reason why Walmsley should lie for these defendants, and he could offer no explanation why he had lied, if indeed he had. He was interrogated as follows:

> "Q. But you didn't tell Mr. Malone all the truth? A. I wouldn't tell the whole story, no.
>
> Q. Why didn't you tell the whole story? A. Why didn't I tell the whole story?
>
> Q. Yes. A. I didn't want to get mixed up in a case like that.
>
> Q. You did get mixed up in it? A. I wasn't mixed up in it.
>
> Q. You weren't mixed up in it? A. No, sir" (479-80).

The only rational explanation for Walmsley's conduct is that he was telling the truth when he first appeared before the grand jury, and that subsequently he was compelled to lie to serve some ulterior purpose.

4. In thus presenting the essence of the government's case against the petitioner Cawthorn, which rested upon this shabby structure, we have intentionally refrained from alluding to any of the petitioner's testimony or the testimony of witnesses called in his behalf, which might be regarded, in the minds of the jurors, as controversial.*

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* For example, Oliveira's testimony concerning "the first meeting" with Cawthorn on Gravier Street on June 5, 1945, was flatly contradicted not only by Cawthorn (1175-6) but by Julius A. Blackman, the Mayor of Alexandria, Louisiana (1024, 1029).

Walmsley's story about the meeting at his office was contradicted not only by defendants Noe and Cawthorn, but by proof of circumstances which clearly supported their contention that they visited

We venture the opinion that if the testimony of these government witnesses had been presented and weighed in an atmosphere free from prejudicial error, the result would have been different.

The Questions Presented

The principal questions presented are as follows:

1. Whether a juror, who discloses at the instance of the government the vote of a fellow juror upon the latter's trial on a charge of having been improperly influenced, may be prevented by virtue of a juror's privilege, or any other rule of law, from revealing how other members of the jury voted.

2. Whether the instructions approved of by this court in *Allen* v. *United States,* 164 U. S. 492, were intended to apply indiscriminately in all federal criminal prosecu-

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Walmsley to find out if one of the jurors on the Burton trial panel, a Mr. K. F. Blue, had a son who was employed by the Federal Bureau of Investigation, as Cawthorn had been informed by a New Orleans lawyer (1170). The lawyer who furnished this information (1288) and who suggested that Walmsley might know more about it (1290) testified at the trial (1287-91). Mr. Blue also testified on behalf of the defendants (1096) and confirmed the fact that he had been a juror on the Burton trial panel (1098) and that his son was indeed a lawyer and an agent for the Federal Bureau of Investigation (1098).

Like Oliveira, Walmsley also participated in the quaint custom of meeting Cawthorn by chance (468-9) in the public lobby of a New Orleans hotel with "plenty" of people present (530) and listening to incriminating suggestions (id.). On cross-examination, he testified:

> "Q. You seem to have a habit of running into people, two in the Roosevelt with Mr. Cawthorn and one with Mr. Noe. Is that right? A. Yes.
>
> Q. You frequent lobbies very frequently? A. No. My business takes me out—the Roosevelt Hotel, meetings at *night time.*
>
> Q. And when was your meeting with Mr. Noe? A. In the *afternoon*" (488).

tions where a jury fails to agree, or whether the use of these instructions was intended to be limited by a due regard for the circumstances of the particular case.

3. Whether a witness' self-interest and fear, to prove his bias, may be established by extrinsic evidence independently of cross-examination, as was held by the Court of Appeals in the Second Circuit (*United States* v. *Beekman*, 155 F. (2d) 580, 584) and by the Court of Appeals for the District of Columbia (*Ewing* v. *United States*, 135 F. (2d) 633), or whether such evidence is inadmissible until the witness' attention has been called specifically to his prior statements as was held by the Court of Appeals in this case.

4. Whether an indictment which charges, in one count, a conspiracy under § 242 of Title 18, United States Code and a conspiracy under § 88 of that title is duplicitous and should have been dismissed on defendants' motion.

Reasons for Granting the Writ

I

The trial court decided an important question of federal criminal law in conflict with the decision of this court in *Clark* v. *United States*, 289 U. S. 1. As Judge Hutcheson stated in his dissenting opinion, on defendants' unsuccessful motion for rehearing in the Court of Appeals:

> "The question decided here by the District Judge on the purported authority of *Clark's* case, and by this court on the same authority, that the evidence as to how the other jurors voted was immaterial, was not presented in that case, and could not have been. For there how each and all of the jurors voted was fully testified to. What and all that the *Clark* case decided was that in a criminal case involving jury misconduct, it was not an invasion of jury privacy but was proper

> to inquire into how jurors voted if the inquiry had relevance to the charge. Here, under the *Clark* case, *supra,* it was certainly proper to inquire how LaBranche voted. But it was certainly equally proper for defendants, on cross-examination, to prove, as bearing on the inquiry, how the other jurors voted" (2276).

In the *Clark* case, a juror was charged with criminal contempt because she had concealed, or misstated, upon the voir dire examination, matters which would have led to her being challenged by the government. Testimony was admitted concerning her conduct during the deliberations of the jury, and it was established that eleven jurors were for conviction and that the single vote for acquittal was cast by Mrs. Clark. This court assumed, without deciding, that there was a privilege protecting "from impertinent exposure the arguments and ballots of a juror while considering his verdict" (pp. 13-14), but refused to apply it so as to prevent the government from proving the misconduct of the juror. That holding supports the government's proof in the case at bar, through the witness Adams, concerning LaBranche's vote, but it just as clearly supports the inquiry made by counsel for the defendants on cross-examination concerning the votes of the other jurors, the purpose of which was to show that the jury stood eight to four for acquittal (2142).

As a matter of fact, the prosecutor in this case recognized that this was so when he stated to the trial judge:

> "As I see it, you have two points. One is the question of privilege. And I think under the *Clark* case, it is very clear that in a situation such as this, the privilege is out the window. But you do have a question of relevancy, and I think it is absolutely irrelevant for the defense to try to bring in what the other jurors did" (549).

Nevertheless, the Court of Appeals held in this case that, under the authority of the *Clark* case, the trial court's refusal to permit the witness Adams to testify concerning

how the other jurors voted was proper. It has been held repeatedly that if a privilege exists it may be abandoned where the government adduces testimony touching the subject matter covered by the privilege. It has been so held in connection with a privileged communication between a witness and an agent of the Federal Bureau of Investigation (*United States* v. *Krulewitch* [2 Cir.] 145 F. (2d) 76, 79), in the case of records rendered confidential by regulations adopted pursuant to the Emergency Price Control Act (*United States* v. *Beekman* [2 Cir.] 155 F. (2d) 580) and in the case of records declared confidential by Treasury Department regulations (*United States* v. *Andolschek* [2 Cir.] 142 F. (2d) 503, 506).

Nor can it be contended that the error was not highly prejudicial to the petitioner and to the other defendants in the case. To permit the prosecutor to establish, through the witness Adams, that LaBranche had voted for acquittal and to cut off inquiry by the defendant designed to prove that a large majority of the same jury stood for acquittal, resulted in the inevitable inference that the juror LaBranche alone had voted for acquittal because of a corrupt agreement and not as the result of his honest belief or judgment. Had the defendants been permitted to elicit evidence that a substantial majority of the jurors also voted for acquittal, an almost irresistible inference would have arisen that LaBranche in voting as he did was prompted by honest and conscientious doubts concerning Burton's guilt and that those doubts were reasonable because they were shared with others.

Judge Hutcheson pointed out the effect of the trial court's error, when he stated in his dissenting opinion:

> "This was highly prejudicial to defendants because by the limitation put on the cross examination, the evidence of the government as to how LaBranche had voted was given great and peculiar significance and made perhaps to have overwhelming weight in the decision of the case" (2276).

The ruling of the trial court is indefensible from any point of view. It not only misapplies a decision of this court but injects a pernicious doctrine into the federal criminal law. Judge Hutcheson clearly recognized this when he stated:

> "Indeed, to permit the government, as was done here, to offer a witness and then to deny defendant reasonable cross-examination of that witness is contrary to common fairness as understood by every standard of American justice and due process of law" (2277).

II

The freedom of the jurors in this case, to consider the evidence and decide the guilt or innocence of these defendants on the merits, was materially restricted by the very nature of the issues under consideration. The case which the jury was considering was in itself an object lesson in the possible consequences of voting for an acquittal. The defendant LaBranche stood before the court as a juror whose vote for acquittal had subjected him to the suspicion that in appearing to disagree with the other jurors he had acted from improper motives. Under the circumstances of this case, the coercive effect of the District Court's supplemental charge is not difficult to understand.

In other circuits, it has been recognized that the coercive effect of this type of charge "depends upon the situation at the time it is given * * *" (*Nick* v. *United States* [8 Cir.] 122 F. (2d) 660, 674). The Court of Appeals here refused to recognize such a distinction, thus in effect holding that the instructions approved by this court in the case of *Allen* v. *United States,* 164 U. S. 492, might be used regardless of the circumstances of the case and despite their oppressive effect. Since a minority of the jury standing for *conviction* would understand very well from the circumstances of the case that holding out for conviction would not arouse the hostility of the government or sus-

picion concerning their motives, while a minority voting for *acquittal* would clearly understand its coercive effect, the supplemental charge could be effective only upon those members of the jury who entertained a reasonable doubt concerning the guilt of the defendants. *Burton* v. *United States,* 196 U. S. 283, was a case which this court described in a manner applicable to the case at bar:

> "Here was a case of very great doubt in the minds of some of the jury. It had deliberated for more than thirty-six hours, and been unable to agree upon a verdict" (p. 306).

Referring, in that case, to the supplemental instructions of the trial court which had followed the language found in *Allen* v. *United States,* this court pointed out that "the most extreme care and caution were necessary in order that the legal rights of the defendant should be preserved" (Id., at p. 307).

The fact that no exceptions were taken to the court's supplemental instructions, does not preclude this court from correcting the error (*Brasfield* v. *United States,* 272 U. S. 448), particularly in a case where the "error, as here, affects the proper relations of the court to the jury, and cannot be effectively remedied by modification of the judge's charge after the harm has been done" (Id., at p. 450).

III

The government witness John Joseph Astorias had signed a statement, under oath, for the government agents (653) and had testified, under oath, on two occasions before the Grand Jury and had denied any connection with the Burton tax case (656, 662). Thereafter he became aware that federal agents were investigating his affairs and had examined his safety deposit box (657) where they discovered an accumulation of $19,000 in cash (661). The government also learned that Astorias had approached a member of the Grand Jury outside the Grand Jury room with a not too subtle hint that the juror might obtain some

additional business from the hotel in which Astorias was employed (1710).

Astorias testified at the trial that when he appeared before the Grand Jury for the third time, he was told that he might be indicted for talking to a grand juror outside the Grand Jury room (663). He flatly denied, however, that he was told that he might be indicted for evasion of income taxes (663). He denied that he was afraid that he was going to be indicted (664) and repeated this assertion several times (665-6). He testified that part of the cash that had been accumulated in his safety deposit box represented 5% of the sales by one Kambur of sea food to the Roosevelt Hotel where the witness was employed 659). He accepted this money without the knowledge of his employer (659, 661) for a period of four years and paid no income tax on it (678) because he "figured" that Kambur paid the tax (660). Prior to his appearance as a witness at the trial, he made a settlement with the government and was not indicted (677-8).

It was not until his third appearance before the Grand Jury, that Astorias told the story about money being sent by Burton to LaBranche (1725 et seq.), although he could identify neither LaBranche (675) nor Oliveira (668).* When counsel for the defendants, as part of their affirmative case, offered in evidence the statements made by the witness Astorias to the Treasury agents (1661-63) and his testimony, under oath, before the Grand Jury (1664-1738) in order to "show the state of mind of the witness and his motive in testifying, * * * and for the further purpose

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* Oliveira was brought to the United States attorney's office for Astorias to identify. Astorias then stated that he had "never seen the man" before (669). Oliveira looked at him and said: " 'I remember you, Mr. Astorias. * * * I am Mr. Oliveira, I am the man that called for the package in your office,' * * *." After thinking it over for "about five minutes", Astorias remembered the man "positively". At the trial, however, he was not positive that it was Oliveira (669).

As for LaBranche, Astorias testified at the trial that he "looks like" the man who came to his office for the package. "I am not positive he is the man or not the man" (675).

of impeaching the witness" (1356), the court ruled that "a witness cannot be discredited or his hostility or bias shown by proving statements made by him outside the Court which do not harmonize with the statements made by him on the witness stand until his attention has been called specifically to the former statements, with particularity as to time, place and circumstance, so that he can deny or explain them" (1355).

This evidence was not offered solely for the purpose of establishing that Astorias had made prior statements which did not "harmonize with the statements made by him on the witness stand." It was offered to establish his self-interest or bias (1356). These documents disclosed that Astorias' testimony at the trial, was dictated by his fear of prosecution for crimes which he himself had committed, totally unrelated to the charges against these defendants. The jury which considered this case should have had before it the complete picture of Astorias' self-interest, his willingness to lie under oath to protect his own interests and his efforts to save himself from prosecution. The documents offered in evidence disclosed that Astorias swore before the Grand Jury that he had visited his safety deposit box in which he had $19,000 in cash, for the last time on March 10, 1945, when in fact some of the currency found in that box was not issued by the Treasury Department until July of 1945 (1689, 1690, 1694, 1704). He also denied falsely that Kambur had paid him anything for the business Kambur did with the hotel (1716).

Astorias, therefore, was guilty of perjury committed in the Grand Jury room. A perusal of the documents which were offered in evidence and rejected, shows that not only the prosecutor (1690, 1693, 1698, 1700, 1715, 1717) but the grand jurors (1694, 1704, 1708, 1712, 1714, 1715, 1724) expressed impatience with Astorias' perjury and advised him in no uncertain terms that he was liable to prosecution.

The jury in this case was permitted to hear none of this evidence. Its exclusion constituted prejudicial error. The Court of Appeals, sustaining the ruling of the trial

court, held that statements showing bias or feeling are admissible as impeachment only if the witness' attention has been called specifically to his former statements so that he can deny or explain them (2197-8).*

This holding is in direct conflict with decisions of the Court of Appeals in the Second Circuit such as *United States* v. *Beekman*, 155 F. (2d) 580, where the court held that bias may be proven independently (see also: *United States* v. *Schindler* [C. C. S. D., N. Y.] 10 Fed. 547, and *Hoagland* v. *Canfield* [C. C. S. D., N. Y.] 160 Fed. 146), and in the Court of Appeals for the District of Columbia in the case of *Ewing* v. *United States*, 135 F. (2d) 633, 640, where the court held that bias may be shown by extra judicial statements of a witness and "by extrinsic evidence independently of cross-examination."

The authorities relied on by the trial court (1356-7) and by the Court of Appeals (2197-8) relate to contradictory statements used to attack the credibility of the witness by impeaching his memory (*The Cleary Bros., No. 61* [3 Cir.] 61 F. (2d) 393, 396) and are clearly distinguishable from the authorities which hold that bias and self-interest and fear of disciplinary measures may be established independently of cross-examination (3 Wigmore on Evidence [3rd Ed.] §§ 948, et seq.; 3 Jones on Evidence [4th Ed.] §§ 828, 845).

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*The Court of Appeals found another justification for the exclusion of these documents, namely, that "There was * * * already in evidence without contradiction all that these lengthy documents would tend to show * * *" since "Astorias fully testified in this trial that he was thus put in fear about his income tax * * *" (2198). This was a clear misstatement of the evidence, for Astorias' testimony was quite the contrary. On cross-examination he stated:

> "Q. You were scared you were going to be indicted about three things. One, income tax evasion. A. No, sir, I wasn't" (664).
>
> * * * * * *
>
> "Q. You thought you were going to be indicted? A. No, sir, I didn't think I was going to be indicted.
>
> Q. You were told you were going to be indicted—let's be fair about this? A. No, sir, I didn't know I was going to be indicted" (666).

IV

The petitioner's motion to quash and dismiss the indictment on the ground that it was duplicitous (28) in that in one count two separate and distinct conspiracies were set forth, should have been granted.

Section 88 of Title 18, United States Code, makes it a crime for two or more persons to conspire to commit any offense against the United States or to defraud the United States. When this indictment was filed, § 242 of Title 18, United States Code described an entirely separate and distinct offense, providing that if two or more persons conspired to influence the verdict of any petit juror, they were guilty of a criminal offense punishable by an entirely different penalty from that provided in § 88.

The indictment in this case charged, in one count, not only a conspiracy to commit an offense against the United States and to defraud the United States under § 88, but it also charged a conspiracy to influence the verdict of a petit jury under § 242. It was, therefore, duplicitous and should have been dismissed.

The overruling of the plea of duplicity is contrary to the principle enunciated in *American Tobacco Co.* v. *United States,* 328 U. S. 781, 788, where a distinction is clearly drawn between a conspiracy charge under § 88 and separate statutory offenses made criminal by specific statutes.

It is also in conflict with decisions in other circuits, particularly *Enfield* v. *United States* [8 Cir.] 261 Fed. 141, 142, where the court held:

> "Section 4 of the Espionage Act * * * was expressly intended to replace section 37 [Title 18, § 88] in those cases to which it is applicable * * *."

See also: *United States* v. *Dietrich,* 126 Fed. 664 (C. C. Nebraska).

In these cases, the anti-trust act with its two conspiracies and the Espionage Act were considered as supplanting the general conspiracy statute. Section 242 supplanted that same statute "in those cases to which it is applicable".

CONCLUSION

The jury's verdict convicting this petitioner, after seventy-two hours of deliberation, resulted from coercion and the demonstrable errors committed by the trial court—errors of a kind which are of an import far wider than the unjust determination of one case.

One of the rulings by the trial judge in this case was characterized by the Chief Judge of the Fifth Circuit Court of Appeals as "contrary to common fairness as understood by every standard of American justice and due process of law" (2277).

In our opinion, the other errors mentioned in this petition were no less prejudicial. To permit so unconscionable a result to go unrebuked, would be to acquiesce in a demonstrable miscarriage of justice brought about by a misinterpretation of a decision of this court and a conflict with other circuits.

It is respectfully submitted that the petition for a writ of certiorari should be granted.

Dated: October 21, 1949.

LLOYD PAUL STRYKER,
Attorney for Petitioner.

OPPOSITION

BRIEF

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In the Supreme Court of the United States

OCTOBER TERM, 1949

Nos. 416, 417 and 418

WILLIAM T. BURTON, JOE T. CAWTHORN, AND MARCEL F. LABRANCHE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 2191-2199) is reported at 175 F. 2d 960. The dissenting opinion by Circuit Judge Hutcheson (R. 2273-2277) on motions for rehearing, is reported at 176 F. 2d 865.

JURISDICTION

The judgment of the Court of Appeals was entered on July 18, 1949 (R. 2200) and petitions for rehearing were denied on September 23, 1949 (R.

2278). The petitions for writs of certiorari were filed on October 22, 1949. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether, in a prosecution for conspiring to tamper with a jury, where the prosecution proved by the testimony of one member of the jury in question that another juror, one of the alleged co-conspirators, voted throughout the jury deliberations for acquittal, the trial judge erred in refusing to permit the defense to cross-examine the witness as to how the other jurors finally voted.

2. Whether, after defense counsel were allowed to examine a prior statement by a government witness and his testimony before the grand jury before cross-examining him, it was improper for the court to exclude such documents, later offered for the purpose of impeachment and as showing bias.

3. Whether the giving of the so-called *Allen* instruction, after the jury was unable to agree for twenty-five hours, and two days before the jury returned a verdict, was an illegal coercion of the jury verdict.

4. Whether the indictment was duplicitous for charging a conspiracy to obstruct the administration of justice and to defraud the United States of its right to an honest and unbiased jury.

5. Whether the only charge and evidence against petitioner LaBranche was with respect to the substantive offense of bribery so that he could not be guilty of conspiracy.

STATUTES INVOLVED

Section 37 of the Criminal Code (18 U.S.C. [1940 ed.] 88) provided:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

Section 135 of the Criminal Code (18 U.S.C. [1940 ed.] 241) provided in pertinent part:

> Whoever corruptly * * * shall endeavor to influence, intimidate, or impede any witness, in any court of the United States * * *, or any grand or petit juror * * * of any court of the United States, * * * or who corruptly * * * shall influence, obstruct, or impede, or endeavor to influence, obstruct, or impede, the due administration of justice therein, shall be fined not more than $1,000, or imprisoned not more than one year, or both.[1]

[1] The maximum fine and prison term imposable under this section were increased to $5,000 and five years, respectively, by the Act of June 8, 1945, c. 178, § 1, 59 Stat. 234, which was passed during the continuance of the conspiracy charged in the instant case.

Section 136 of the Criminal Code (18 U.S.C. [1940 ed.] 242) provided in pertinent part:

> If two or more persons conspire * * * to influence the verdict * * * of any * * * petit juror in any such court [*i.e.*, of the United States], * * * each of such persons shall be fined not more than $5,000, or imprisoned not more than six years, or both.[2]

STATEMENT

On January 3, 1946, a single-count indictment (R. 3-11) was filed in the United States District Court for the Eastern District of Louisiana. It charged the petitioners, William Burton, Joe Cawthorn, and Marcel LaBranche, together with James Noe, a codefendant, with having conspired with one another and with three others not indicted, Edwin Oliveira, Bernard Hughes, and John Astorias, "to commit offenses against the United States," namely, "corruptly to endeavor to influence, obstruct and impede and corruptly to influence, obstruct and impede the due administration of justice" in a certain criminal trial, held in June 1945 in the same federal district court, in which the petitioner Burton had been charged with income tax evasion, and "to de-

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[2] This section was amended, by the Act of June 8, 1945, c. 178, § 3, 59 Stat. 234, which was passed during the continuance of the conspiracy charged in the instant case, to read, in pertinent part:

"If two or more persons conspire to violate any provision of section 135 * * * of the Criminal Code, as amended, and one or more of such persons does any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished in like manner as provided by [that section]."

fraud the United States of and concerning its governmental function of considering and deciding [Burton's guilt in the tax case] through the petit jury * * * free from corruption, improper influence and fraud, by virtue of the personal and pecuniary interest of the petit jurors in the success of the defendant in the said criminal prosecution" (R. 4-5), in violation of Section 37 of the Criminal Code, (*supra*, p. 3).

Petitioner Burton was the principal figure involved, and the evidence showed one general conspiracy to effect his acquittal at his tax evasion trial, which lasted from June 4 to June 27, 1945 (R. 358, 1499-1500). The efforts of all the co-conspirators were directed to the achievement of this result.

The defendant Noe was a former Governor of Louisiana (R. 874) and a good friend of Burton (R. 1365). Knowing that Fred Dinghaus was a member of the petit jury panel for the trial of Burton's case (R. 453), Noe asked him in a conversation two or three weeks before the trial if he was on the jury. When Dinghaus replied that he was, Noe said, "Well, Burton is a good friend of mine; he is nothing but a country yap * * * and knows nothing about office work or bookkeeping." After Dinghaus answered that this did not make any difference because he would find a defendant guilty or not by giving him a fair trial according to what the evidence was, Noe said, "Well, I am sure that's all Mr. Burton would want." (R. 455, 456). Three

or four weeks after the Burton case ended in a mistrial, Noe summoned Dinghaus to his office and "thanked" him "for the outcome of the Burton case" (R. 457). Dinghaus demurred, saying, "I don't know whether or not you know how I voted." Noe replied, "Regardless of how you voted, I want to thank you anyway." (*Ibid.*)

The alleged co-conspirator Hughes, an insurance man, approached Henry Groffman, also an insurance man, in May 1945, after learning that Groffman was on the jury panel for Burton's trial. As a ruse to meet Groffman, Hughes stated he had an insurance prospect who was overweight and might get a better rate with one of Groffman's companies. (R. 449-451.) Immediately after their meeting began, Hughes mentioned the fact that Groffman was on the jury and stated that Burton was "the finest man in the world, but ignorant of bookkeeping and income taxes." He also asked Groffman several times to do "the right thing" for Burton. (R. 450.) Groffman, however, was subsequently excused from service on the Burton jury (R. 451). Supplementary evidence, tending to explain Hughes' interest in helping Burton to get acquitted, was as follows: Hughes had been foreman of a petit jury which had acquitted the alleged co-conspirator Noe in a tax evasion trial in 1942 (R. 450, 877); Noe thereafter purchased substantial amounts of insurance through Hughes as broker (R. 363-364, 371, 376, 380; Gov. Exs. 7 and 14, R. 1503, 1514); up to about the time of Burton's tax evasion trial, Noe owed

Hughes substantial sums in connection with these insurance transactions (R. 427-428, 432-433, 959; Gov. Ex. 48, R. 1589; Noe-Ervin Ex. 14, R. 1828-1829); Noe paid these debts at about the time of the commencement of Burton's tax trial (R. 407; Gov. Exs. 37 and 40, R. 1580-1581, 1584); the payment was made possible by Noe's obtaining funds from Burton (R. 399-400, 435-436, 998; Gov. Ex. 43, R. 1586).

Around the latter part of May or the first part of June, 1945, Hughes Walmsley, who knew both Noe and petitioner Cawthorn (R. 464), met them at his office at Noe's suggestion. Either Noe or Cawthorn, who was Burton's trial counsel in the tax fraud case (R. 1165-1167), showed Walmsley a list of the prospective jurors, and asked if he knew any of them (R. 465). After indicating he knew about ten of the jurors, Walmsley was asked by either Noe or Cawthorn if he knew any of them well enough to talk to them, to which Walmsley answered, "No" (R. 466). Noe and Cawthorn told Walmsley that it would be to his interest if he could help them in the matter of talking to the jurors, but he said he was not interested (R. 467). Later, about June 19, 1945, during the course of the Burton trial, Noe told Walmsley it would be to his benefit if he could help in the matter they discussed at the latter's office (R. 467). Also during the Burton trial, Cawthorn told Walmsley, in the lobby of the Roosevelt Hotel in New Orleans, that he could make $1,000 if he would "talk to those fel-

lows," but Walmsley declined, saying he was not interested (R. 468-469). On a second occasion during the trial, in the same hotel lobby, Cawthorn asked Walmsley if he would talk to any of "those people," but was told, "No." (R. 470.) On a third occasion in this hotel lobby, during the early part of June 1945, Burton himself spoke to Walmsley about his lack of bookkeeping knowledge and complained that the Government was taking unfair advantage of him (R. 471). Walmsley did not contact any of the jurors either prior to or during the trial (R. 471).

Oliveira and his "good friend", petitioner LaBranche, were both members of the jury panel selected for the Burton trial (R. 557, 558, 559). On or about June 4, 1945,[2] Oliveira and LaBranche, having heard a rumor that "there would be plenty [of] money put out for the jury," agreed that if either of them should be chosen to serve on the jury, they would divide any money received by the one selected. Oliveira was excused by the Government from jury service, but LaBranche served. (R. 558-559.) That evening the two men met at the "Town Club" in New Orleans, where Oliveira said he would make "the necessary contacts" for getting "some money" (R. 559-560). Later, Oliveira met petitioner Cawthorn on the street. Caw-

[2] All dates referred to in Oliveira's testimony are approximate only. Oliveira testified that he could not possibly remember the exact dates of his meetings and conversations with LaBranche, Cawthorn, and Burton (R. 567, 571, 575, 577, 580, 584, etc.).

thorn told Oliveira he was sorry the latter did not "get on the jury," but asked if he had any "good friend" on it. Oliveira mentioned LaBranche, and Cawthorn inquired whether LaBranche could be trusted and whether he would be interested in "making some money." Oliveira said he would have to discuss the matter with LaBranche. Cawthorn admonished Oliveira to "be careful, because you are dealing with the Government. It is a serious matter." (R. 561, 562.) When Oliveira next saw LaBranche, LaBranche at first seemed not interested, but finally told Oliveira to "see what you can do" about "getting some money" (R. 562-563). Thereafter, Cawthorn and Oliveira again met on the street. Cawthorn told Oliveira to inform LaBranche that there "will be a thousand dollars for him and five hundred for you if he votes favorably in the acquittal of Mr. Burton." (R. 563.) This agreement had been approved by Burton (R. 566). When Oliveira conveyed this message to LaBranche, LaBranche expressed concern at the chances he and Oliveira were taking, and it was decided that Oliveira should see Cawthorn again in an effort to get "a larger amount of money" (R. 563, 564.) Later, Cawthorn met Oliveira in the St. Charles Hotel lobby (R. 566), where Cawthorn told Oliveira to meet him in a certain room in the hotel. Oliveira there reported to Cawthorn that LaBranche "wasn't satisfied." Cawthorn told Oliveira to "go back and tell LaBranche not to worry about that money— * * * that we all

would get more money after the trial was over; that Burton was a good fellow." (R. 567-568.) At about the middle of the trial one night in the Roosevelt Hotel, Burton personally confirmed Oliveira's understanding, reached with Cawthorn, that LaBranche was to receive $1,000 and Oliveira $500 (R. 568, 569).

On the evening of the day on which the trial ended (R. 569), Oliveira asked Burton about the money, and Burton advised him that he would get the $1,500 in a package from the alleged co-conspirator Astorias, the Roosevelt Hotel chef, on the following morning (R. 570). When Oliveira asked Astorias for the package, Astorias said he knew "Mr. Burton very well, but he didn't leave any package" (R. 571). When Oliveira imparted this advice to LaBranche, the latter lamented, "It looks like we're blowed up—that we ain't going to get anything" (R. 572). However, about two weeks after the trial, LaBranche did receive from Astorias a package containing $1,500, which Burton had left with Astorias to be turned over to LaBranche (R. 573, 650). Oliveira and LaBranche divided the money at the Monteleone Hotel (R. 573). Some two to four weeks later, Burton thanked Astorias "for giving the man the package, it worried the hell out of me" (R. 651).

The Government also showed that on or about May 24, 1945, eleven days before the commencement of his tax evasion trial on June 4th, petitioner Burton drew $70,000 from his personal account in

a Lake Charles, Louisiana bank (R. 1411-1412; Gov. Ex. 65, R. 1605). Burton admitted drawing out this money (R. 1411) and described it as his "fighting fund" (R. 1415).

At Burton's tax evasion trial, LaBranche voted for Burton's acquittal during the entire course of the deliberations (R. 545). That prosecution resulted in a mistrial because of failure of the jury to agree (R. 358, 1499-1500).

The jury in the instant trial acquitted Noe, but found petitioners Burton, Cawthorn and LaBranche guilty (R. 287). Each of the petitioners was sentenced to two years' imprisonment and to a fine of $10,000 (R. 2165, 2166-2167, 2167-2168). On appeal to the Court of Appeals for the Fifth Circuit, the judgments of conviction were affirmed (R. 2200). Petitions for rehearing were thereafter denied (R. 2278), one judge (Hutcheson, J.) dissenting, expressing the view that the convictions should be reversed and a new trial granted, on the sole ground that the trial court committed prejudicial error in limiting the cross-examination of a certain prosecution witness, a juror in the Burton trial (R. 2273-2277), as to which see pp. 11-23, *infra*.

ARGUMENT

1. Leon Adams, one of the jurors in the Burton tax evasion prosecution, was a government witness in the instant conspiracy case (R. 544). On direct examination, he testified, without objection, that petitioner LaBranche, one of his fellow jurors in

the tax evasion case, voted for Burton's acquittal "[d]uring the entire course of the deliberations" (R. 544-545). The obvious purpose of the Government in eliciting this testimony was, of course, to corroborate so much of the Government's other evidence (see pp. 8-11, *supra*) as tended to show a conspiracy on the part of petitioners to purchase LaBranche's favorable vote as a juror in the tax evasion prosecution. On cross-examination, Adams was asked "how many other [jurors] voted for not guilty?" (R. 545.) Government counsel objected on the ground that it was "entirely irrelevant and immaterial" how other jurors voted (*ibid.*).

Argument on the question of the propriety of this line of cross-examination was then had outside the presence of the jury (R. 546-554). The essence of defense counsel's argument in support of the legitimacy of the challenged question was as follows (R. 550):

> * * * This witness [Adams] is presented by the Government. * * * he is asked a question, how did a particular man vote? Well, I would think it would be absolutely elementary that on cross-examination this witness' *memory can be tested,* his credibility can be tested and he can be asked, individually, the names of every one of those men *to determine whether or not he remembers how everybody else voted.* * * * [italics added]

The trial judge countered that "you can't test the credibility of a witness on a collateral matter" (R.

551), to which defense counsel replied, "You can't contradict a witness on a collateral matter, but you certainly *can test his credibility* on a collateral matter" [italics added] (*ibid.*). Further exchanges between the trial judge and defense counsel in this colloquy likewise indicate that the point at issue between them was the propriety or impropriety of the question which occasioned the colloquy as a cross-examination device for exploring the matter of the witness Adams' *memory and credibility* in respect of his direct testimony that LaBranche had voted for Burton's acquittal throughout the jury's deliberations (see R. 551-552).

At the conclusion of the colloquy, the trial judge announced his decision in these terms (R. 552-553):

> * * * you can't test his credibility on a collateral matter. I am convinced * * * that it is entirely irrelevant * * * how other jurors voted in this proceeding. * * * It is certainly not the purpose of the Court to shut off any cross-examination that the Court considers proper. I simply intend to rule * * * that I take it it will be improper to ask the witness how the balance of the jury voted in this case. * * * that is the only restriction I am placing on the cross-examination.

The jury was then recalled and the cross-examination of Adams resumed. Defense counsel was permitted to ask the witness if he remembered how each of eight other named jurors voted, "without saying how he voted," and the answer was in the

affirmative in each instance (R. 555). The judge also permitted the following question (*ibid.*): "Do you remember whether or not any of those men, without naming them or saying how they voted, took one position at the first ballot and didn't change throughout?" The reply, not entirely responsive, was (R. 556): "There were some changes. There were changes during the deliberations from the original ballot. * * * There were certain ones that might have changed—that did change." This reply evidently satisfied defense counsel, as no further questions were asked the witness.

The dissenting judge below based his dissent solely on his belief that the trial judge erred in refusing to permit the witness Adams to be cross-examined as to how many jurors other than LaBranche voted for Burton's acquittal. He said (R. 2275-2276):

> It is and was the contention of the defendants that had the juror [Adams] been permitted to testify as to how each juror voted, his testimony would have shown that some of them voted for acquittal, some for conviction, and that when the jury was discharged, eight were for acquittal and four were for conviction. Their cross examination limited on the wholly untenable theory that how the other jurors voted was immaterial, defendants, compelled to have the issue go to the jury on the evidence that LaBranche had voted throughout for acquittal, were deprived of their right to show that others had voted for acquittal too * * *.

Petitioners now adopt this argument (Burton Pet. 8-15; Cawthorn Pet. 18-21; LaBranche Pet. 20-24). Thus, petitioner Burton argues (Pet. 12) that "As a result of the trial court's action * * * the defendants were prevented from showing that numerous other members of the jury in the income tax case had voted for acquittal." And see Cawthorn Pet. 20; LaBranche Pet. 20-21. As we have pointed out, however (*supra*, pp. 11-13), the sole articulated point of dispute between defense counsel and the trial judge during the colloquy concerning the propriety of the controverted question sought to be asked Adams was the legitimacy of that line of questioning as a means of testing Adams' *memory and credibility* in respect of his direct testimony that the juror LaBranche had voted for acquittal throughout the jury's deliberations.[4]

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[4] It is true that in one isolated passage during the colloquy, which extended over some nine pages of the printed record (R. 546-554), defense counsel remarked that "it would be most unfair to have it appear here now that LaBranche was the only one that voted that way" (R. 552). Whatever merit this point might have had, however, it was articulated at no other time during the colloquy, and it is manifest from a reading of the colloquy as a whole that it was never brought home to the trial judge as possibly a sound basis for the admissibility of the controverted line of questioning, distinct from its asserted relevancy as a test of the witness' memory and credibility. Cf. *Johnson* v. *United States*, 318 U. S. 189, 199-201.

The only other record reference supplied by petitioners (see Burton Pet. 12) as evidence of their reliance at the trial on the now-asserted claim that the disputed line of questioning was relevant to show that other jurors than LaBranche also voted for Burton's acquittal is R. 2142, where defense counsel stated: "* * * we proposed to show, as a matter of fact, the jury was eight to four for acquittal * * *." This, however, occurred long after the trial in connection with argu-

But apart from petitioners' tardiness in articulating this contention, we submit that it is without merit. Their reliance on *Clark* v. *United States*, 289 U. S. 1, 12-19, is misplaced. That case involved a prosecution for contempt of court by one Mrs. Clark, the charge being that she, a prospective juror in the trial of one Foshay for mail fraud, wilfully concealed at her *voir dire* examination the fact that she had formerly been employed by a company headed by Foshay and had other reasons to be biased in Foshay's favor, and wilfully and falsely swore to lack of bias with respect to Foshay. At the trial on the contempt charge, the Government adduced evidence to show Mrs. Clark's bias in favor of Foshay (and consequently the false and misleading nature of her answers on the *voir dire*), and also showed that during the jury deliberations in the Foshay trial (which resulted in a mistrial by virtue of a hung jury, 11 jurors having been for conviction and one for acquittal) Mrs. Clark was the one juror who steadfastly voted for Foshay's acquittal. The sole issue before this Court (having any relevance to the issue in the present case) was the admissibility of Mrs. Clark's conduct as a juror in the Foshay trial and the manner in which she held out for Foshay's acquittal throughout the

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ments on motions to set aside the verdicts (see R. 2122). Even at that stage of the proceedings, moreover, it is clear that this argument was so blended and confused with the distinct argument relating to the question's relevance in respect of the issue of Adams' memory and credibility that it was never adequately brought to the trial judge's attention.

jury's deliberations. The argument advanced in opposition to the admissibility of this evidence was, in the words of the Court (289 U. S. at 12-13), that "* * * the arguments and votes of jurors, the *media concludendi,* are secrets, protected from disclosure unless the privilege is waived. * * * Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world." But the Court, while conceding the "force of these considerations" (289 U. S. at 13), held that social policy dictated an *exception* to this basic rule where a juror in a given case became a juror by virtue of concealment of the truth at her *voir dire* examination. The Court said (289 U. S. at 14):

> The privilege [not to have one's conduct and vote as a juror disclosed] takes as its postulate a genuine relation, honestly created and honestly maintained. If that condition is not satisfied, if the relation is merely a sham and a pretense, the juror may not invoke a relation dishonestly assumed as a cover and cloak for the concealment of the truth. In saying this we do not mean that a mere charge of wrongdoing will avail without more to put the privilege to flight. There must be a showing of a *prima facie* case sufficient to satisfy the judge that the light should be let in. Upon that showing being made, the debates and ballots in the jury room are admissible as corroborative evidence, supplementing and confirming the case that would

exist without them. Let us assume for illustration a prosecution for bribery. Let us assume that there is evidence, direct or circumstantial, that money has been paid to a juror in consideration of his vote. The argument for the petitioner, if accepted, would bring us to a holding that the case for the People must go to the triers of the facts without proof that the vote has been responsive to the bribe. This is paying too high a price for the assurance to a juror of serenity of mind.[5]

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[5] *State* v. *Serpas*, 188 La. 1074 (1938), relied on by the dissenting judge below (R. 2276) and by petitioner Burton (Pet. 13), presented a situation just the converse of that of the *Clark* case. Serpas was charged with wilfully perjuring himself by denying, on *voir dire* examination, that he knew any member of the family of one Goodwin, on trial in a criminal case. In consequence of this denial, and being otherwise qualified, he was accepted as a juror for the Goodwin trial, which resulted in a hung jury, of whom eleven were for conviction, the twelfth refusing to participate in the deliberations. Serpas in fact did know a member of Goodwin's family, but claimed at his perjury trial that he had not known, at the time of Goodwin's trial, that the person he knew was related to Goodwin. To substantiate his claim of lack of wilfulness in denying being acquainted with any member of Goodwin's family, he offered to prove that he was one of the eleven who had voted to convict Goodwin, and not the recalcitrant juror. This offer of proof was rejected by the trial judge, but on appeal the ruling was reversed, largely on the authority of this Court's decision in the *Clark* case.

The *Serpas* decision was, we think, plainly correct, both for the reasons which dictated the result in the *Clark* case, *viz.*, an overriding social policy requiring, in the circumstances, relaxation of the rule that the way in which a juror votes may not be disclosed, and for the equally cogent reason that Serpas, by offering to show how he voted, waived his privilege against disclosure. But the *Serpas* issue, like the *Clark* issue, is manifestly distinct from that presented by the case at bar.

Thus, the *Clark* case is square authority for the propriety of the Government's evidence in this case that the juror LaBranche held out for Burton's acquittal throughout the jury's deliberations, and, indeed, it was because of defense counsel's awareness of the *Clark* holding that no objection was made at the instant trial to that evidence (see R. 546). But it is not authority, as petitioners and the dissenting judge below suppose (see R. 2276), for the further proposition that the defense was entitled to show, on cross-examination of the witness Adams, that jurors *other than LaBranche* also held out for Burton's acquittal. No such issue was before the Court in the *Clark* case. It is true that it appears in the *Clark* opinion (see 289 U.S. at 9; and for the lower courts' opinions in that case, see 61 F. 2d 695, 698; 1 F. Supp. 747, 750) that Mrs. Clark *alone* voted for acquittal, all eleven of the other jurors having been for conviction. But there was no question in the *Clark* case as to the propriety or impropriety of evidence as to how jurors other than Mrs. Clark had voted. It does not even appear by what means the 11-to-1 split among the jurors was ascertained. Moreover, the *Clark* case involved a contempt proceeding before a judge sitting without a jury (unlike the case at bar), and it may be that, because of that fact, rules of evidence were not insisted upon strictly. Consequently, the *Clark* case is not an authority for petitioners' present contention.

Rather, insofar as the *Clark* case is at all controlling on the present issue, it is adverse to petitioners' contention. For the Court in the *Clark* case acknowledged as a *general principle* that the conduct and votes of jurors are properly considered secret matters which may not be divulged, without express consent on the part of each juror involved, *except* when an overriding consideration of public policy (which was found to be present in the peculiar circumstances of that case, so far as the vote of Mrs. Clark was concerned) dictates a relaxation of this rule. But no such consideration is present in the case at bar. The present issue is governed by the general principle recognized in the *Clark* case, rather than by the exception carved out of that principle by that case.

Correctly interpreted, the *Clark* case stands for the twofold proposition that (1) jurors, in general, are privileged not to have their conduct and manner of voting disclosed without their express consent, but that (2), by way of exception, where a certain juror is on trial for his own misconduct in connection with his status as a juror, he may not rely on this privilege. In the instant case, if jurors other than LaBranche had also been on trial for misconduct, it would of course have been proper, under the *Clark* decision, to admit evidence as to how they voted. But, no juror other than LaBranche having been charged with misconduct, the trial judge correctly excluded the

line of questioning, in the cross-examination of Adams, designed to show how other jurors voted. The issue before the jury—so far as is immediately pertinent—was whether the juror LaBranche had been "bought." There was evidence that he had been. Corroborating that evidence was the unchallenged additional evidence that his vote was "responsive to the bribe" (289 U.S. at 14). The manner of voting of no other juror was in issue, the integrity of no other juror having been challenged by the Government. It was quite irrelevant, therefore, to any issue at the trial how any other juror voted. Even if, as is now claimed, the defense could have proved, through cross-examination of the witness Adams, that seven other jurors had also voted for Burton's acquittal, that fact could have had no relevance, because their votes (unlike LaBranche's) were susceptible of no sinister interpretation. The situation here is closely parallel to that discussed in *United States* v. *Manton,* 107 F. 2d 834, 845-846 (C.A. 2) certiorari denied, 309 U.S. 664. It was there pointed out that the fact that the appeals in which Judge Manton participated might in fact have been "rightly decided," and that "the other judges who sat in the various cases" with Manton voted with him, was entirely irrelevant, because Manton's fellow judges "acted honestly and with pure motives," whereas Manton acted "for a price." Here, LaBranche would have been just as guilty

in the eyes of the jury, and rightly so, if the latter believed that seven other jurors voted honestly for Burton's acquittal, while he alone voted dishonestly, as if the jury believed that LaBranche was the only juror who voted for acquittal.

Furthermore, as we have pointed out (*supra,* p. 14), the defense was permitted to establish, in its cross-examination of Adams, that certain of LaBranche's fellow jurors changed their votes during the course of the deliberations. Thus, the jury in the instant case knew that at least at some stage or stages of the deliberations some of LaBranche's co-jurors also favored the acquittal of Burton. Consequently, the jury in the instant case were well aware that the evidence against Burton was not such that only a "bought" juror could possibly have held out for his acquittal. It is not true, therefore, as petitioners contend (Burton Pet 12; and see Cawthorn Pet. 20; LaBranche Pet. 21), that the jury below were "left to conclude" that LaBranche was the only juror in the tax-fraud trial that ever favored Burton's acquittal, and that they thus must inevitably have inferred that LaBranche's vote "must have been motivated by some factor other than the merits—the bribe allegedly paid him." On the contrary, the jury in this case was at no time under the impression that LaBranche and only LaBranche cast his vote for Burton's acquittal.

For the foregoing reasons, we submit, no error, and certainly no reversible error, was committed by

the trial judge in ruling out the attempted line of cross-examination.[6]

2. John Astorias, one of the alleged but unindicted co-conspirators, was a prosecution witness at petitioners' trial. He had previously appeared three times before the grand jury which indicted petitioners, and had also made a statement to Treasury agents. The transcript of his grand jury testimony and of his statement to the Treasury agents covered, in all, some 77 printed pages (see R. 2197). With the object of discrediting Astorias' testimony at the trial by eliciting from him admissions that he had previously given conflicting statements to the grand jury and to the Treasury agents, defense counsel asked leave of court to examine Astorias' earlier statements for cross-examination

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[6] Additionally, it should be pointed out that, assuming—for argument's sake only—that the defense was entitled further to show that jurors other than LaBranche also voted for Burton's acquittal, the mode of proving this fact which the defense attempted was improper. The proper course would have been to call, as defense witnesses, the various jurors who sat in the tax case and to ask each how he voted. Each juror could then have claimed or waived, as he saw fit, his privilege not to disclose his manner of voting. Instead, the defense attempted to establish that other jurors voted for Burton's acquittal by cross-examination of Adams. This was improper for the twofold reason that (1) Adams had no right to waive the personal privilege of each of the other jurors against disclosure of his vote, and (2) this line of interrogation was beyond the scope of the direct examination, and hence improper under familiar principles, since Adams had been asked on direct solely how LaBranche had voted. In short, proof that jurors other than LaBranche had also voted "not guilty," if competent at all (which we deny), was properly a part of the defense's affirmative case, and hence not properly adducible by cross-examination of the government witness Adams.

purposes (R. 687-688, 694-695, 1356). The request was granted, and defense counsel were given all the time they needed to examine Astorias' earlier statements—considerably more time, in fact, than was asked for (R. 1356). On cross-examination, Astorias was confronted with four selected excerpts from the transcripts of his earlier statements, which the defense maintained conflicted with his trial testimony; he readily admitted having made the earlier statements with which he was confronted, and this concluded his cross-examination (R. 696-698). Shortly thereafter, the Government rested its case (R. 703), and Astorias returned to his home in Gulfport, Mississippi.

Near the end of the trial, the defense offered in evidence the entire transcripts of Astorias' prior statements to the grand jury and Treasury agents, as defense exhibits (Burton) 1, 2, 3, and 4 (R. 1347-1348), for the announced purpose of showing "the state of mind of the witness and his motive in testifying, * * * and for the further purpose of impeaching the witness" (R. 1356). As later more fully articulated, the purpose of the offer was "to show that the witness testified as a result of fear, and under duress, hence has an interest and a motive, and is biased" (R. 1797). The Government objected to the offer, and its objection was sustained on the ground that "it is a well settled principle that a witness cannot be discredited or his hostility or bias shown by proving statements made by him outside the Court which do not harmonize

with the statements made by him on the witness stand until his attention has been called specifically to the former statements, with particularity as to time, place and circumstances, so that he can deny or explain them" (R. 1355). Numerous decisions were cited by the trial judge in support of his ruling (R. 1356-1357).

Petitioners now renew their argument, which was unanimously rejected by the Court of Appeals (R. 2197-2198), that it was error to exclude the proffered transcripts (Burton Pet. 15-24; Cawthorn Pet. 22-25; LaBranche Pet. 24-29). The trial court's ruling was, however, in full accord with the well established principle stated in *The Charles Morgan,* 115 U. S. 69, 77, that "contradictory declarations of a witness, whether oral or in writing, made at another time, cannot be used for the purpose of impeachment until the witness has been examined upon the subject, and his attention particularly directed to the circumstances in such a way as to give him full opportunity for explanation or exculpation, if he desires to make it." The ruling likewise accorded with the other decisions cited by the trial judge to the same effect (see R. 1356-1357). See also *Arnstein* v. *United States,* 296 Fed. 946, 950 (C.A. D.C.), certiorari denied, 264 U. S. 595.

Clearly distinguishing the instant case from the decisions cited by petitioners, including those indicating that evidence of bias is admissible without the requirement of laying a foundation (see Burton

Pet. 27; Cawthorn Pet. 25; LaBranche Pet. 27), is the fact that defense counsel were given two hours, though only one was requested, in which to examine Astorias' earlier statements before probing the witness in respect of prior inconsistent statements and bias (R. 1356); yet, as we have indicated, he was questioned in regard to only four selected excerpts from the entire transcripts of his earlier statements.

Petitioners assert that much evidence contained in the excluded documents showed that the prosecutor and the grand jurors accused Astorias of perjury (see Burton Pet. 19; Cawthorn Pet. 24; LaBranche Pet. 28-29), and that the jury should have been allowed to hear this to show Astorias' self-interest and bias in testifying for the Government. However, on his cross-examination, Astorias admitted he had committed perjury (R. 676), so that the jury were fully aware of that fact in weighing the credibility of his testimony. Petitioners also argue that the Court of Appeals was wrong in stating that "there was * * * already in evidence without contradiction all that these lengthy documents would tend to show" (R. 2198) regarding Astorias' fear of prosecution for not having paid his income taxes. They point out that Astorias denied on cross-examination that he feared being indicted for income tax evasion (R. 664, 666), whereas the excluded documents would have shown that he was apprehensive of indictment (see Burton Pet. 20-21;

Cawthorn Pet. 23; LaBranche Pet. 28). But Astorias admitted on cross-examination that he knew the Treasury agents were investigating his affairs (R. 657); that he went before the grand jury about three months after the federal agents learned of the existence of $19,000 in a safety deposit box upon which he had not paid income taxes (R. 662); and that he was "scared [he] was going to be mixed up in something" and that he never mixed up in anything (R. 664). Thus, the jury were thoroughly apprised, from Astorias' own testimony, of his fears arising from his income tax difficulties, and the evidence to that effect contained in the excluded documents could consequently have had no more than cumulative effect.

Petitioners rely upon *United States* v. *Krulewitch,* 145 F. 2d 76 (C.A. 2) (see Burton Pet. 22-23; LaBranche Pet. 27), as conflicting with the Court of Appeals' decision in this respect. However, the situations in the two cases are entirely different. In the *Krulewitch* case, the trial judge, after examining a prior statement given to the F.B.I. by a government witness to ascertain if the statement contradicted the witness' testimony, refused to permit the defendant's counsel to inspect the document and sealed it as part of the record; here, as we have shown, the trial judge gave defense counsel ample time in which to examine the transcripts of Astorias' earlier statements and freely permitted counsel to use the transcripts for cross-

examination purposes. The very basis of the *Krulewitch* holding was that, because of the refusal to permit inspection of the witness' earlier statement, it had been impossible for the defense to lay the proper foundation for the introduction of the statement in evidence in the event the witness denied having made it (145 F. 2d at 79).

3. Petitioners maintain that the trial court's use of the *Allen* instruction (based on *Allen* v. *United States,* 164 U. S. 492, 501), as a supplemental charge, had a coercive effect upon the jury and deprived petitioners of a fair trial (Burton Pet. 24-28; Cawthorn Pet. 21-22; LaBranche Pet. 29-31). The contention is clearly insubstantial.

On Saturday morning, May 15, 1948, the case was submitted to the jury (R. 283, 284). At noon on the following day, the court informed the jury that they had been out 25 hours and was told they could not agree on a verdict (R. 1453-1454). The court thereupon gave the jury a supplemental charge (R. 1454-1455) in the exact language of an instruction approved by the Massachusetts Supreme Court in *Commonwealth* v. *Tuey,* 8 Cush. 1, and by this Court in *Allen* v. *United States,* 164 U. S. 492, 501.[7] Upon completion of this supplemental charge, the court asked if there were any exceptions and counsel for

[7] Petitioner Burton's statement (Burton Pet. 26) that the quoted portion of the instruction was an "additional" instruction, which he proceeds to criticize, is not correct because this was a *verbatim* part of the instruction taken from the *Tuey* case.

petitioners made no objections (R. 1455).[8] It was not until May 18, two days later, at about 11:00 a.m., that the jury returned their verdict (R. 286, 287).[9]

In these circumstances, it seems obvious that the court's supplemental charge did not coerce the jury in arriving at their verdict, not agreed upon until about 48 hours later. If there had been any degree of coercion, the verdict would certainly have been reached much sooner.[10] In any event, since the supplemental charge here given was one expressly approved by this Court in the *Allen* case, it was manifestly proper for the trial court to give it.

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[8] *Brasfield* v. *United States*, 272 U.S. 448, is cited (Cawthorn Pet. 22) for the proposition that the fact that no exceptions were taken to the supplemental instructions does not preclude this Court from correcting a manifest error. The *Brasfield* case, however, was not concerned with any question of supplemental instructions. It held only that it was reversible error for a trial judge to ask a disagreeing jury how they were divided.

[9] Petitioners' statement (Burton Pet. 24; LaBranche Pet. 29-30) that after the giving of the supplemental charge the jury was locked up and held *incommunicado* for 48 hours is incorrect and misleading. On each night the jurors had comfortable rooms in the St. Charles Hotel, and the trial judge was at all times available if the jury had questions.

[10] In *Peterson* v. *United States*, 213 Fed. 920 (C.A. 9), relied on by petitioner Burton (Pet. 27), the supplemental charge was "plainly coercive" in stating that "the government has a right to a verdict without further expenditure of time and money" (213 Fed. at 924) and the jury returned with a verdict in less than an hour (213 Fed. at 926). And in *Edwards* v. *United States*, 7 F. 2d 598, 600 (C.A. 8), relied on by petitioner LaBranche (Pet. 30), the charge contained coercive language not used in the instant case, and the coercive effect was evident from the fact that the jury returned a verdict almost immediately after the giving of the supplemental charge.

Weathers v. *United States,* 126 F. 2d 118, 120 (C.A. 5), certiorari denied, 316 U. S. 681; see also *Hyde* v. *United States,* 225 U. S. 347, 381-383; *United States* v. *King,* 162 F. 2d 594, 596 (C.A. 2).[11]

4. Petitioners contend (Burton Pet. 28-32; Cawthorn Pet. 26; LaBranche Pet. 17-20) that the indictment is duplicitous because it charges that the object of the conspiracy was twofold, *i.e.,* to commit an offense against the United States ("corruptly to endeavor to influence, obstruct and impede and corruptly to influence, obstruct and impede the due administration of justice" in a federal court by bribing a juror, in violation of Section 135 of the Criminal Code, *supra,* p. 3) and "to defraud the United States of and concerning its governmental function of considering and deciding [Burton's guilt in the tax evasion case] through the petit jury * * * free from corruption," etc. Similar contentions have been rejected as often as they have been advanced. It has long been settled that a conspiracy indictment or count of this type, where the objective statutory violation bears an obvious relation to the defrauding of the United States with which it is linked as an object of the conspiracy, is not objectionable for duplicity. *May* v. *United States,* 175 F. 2d 994, 1002 (C.A. D.C.), certiorari

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[11] *Burton* v. *United States,* 196 U.S. 283, cited by petitioners (Burton Pet. 26-27; Cawthorn Pet. 22; LaBranche Pet. 31), did not hold there was any error in giving the *Allen* charge, but that it was error to refuse the defendant's request that the court instruct the jury that those requests to charge which had been allowed were as much a part of the charge as the instructions read by the court as emanating from itself. 196 U.S. at 306.

denied October 10, 1949, Nos. 100-102, this Term; *United States* v. *Manton*, 107 F. 2d 834, 839 (C.A. 2), certiorari denied, 309 U. S. 664. Moreover, "The conspiracy is the crime, and that is one, however diverse its objects." *Frohwerk* v. *United States*, 249 U. S. 204, 209-210; *Braverman* v. *United States*, 317 U. S. 49, 54; *Pinkerton* v. *United States*, 328 U. S. 640, 642-643.[12]

5. Finally, petitioner LaBranche argues that since the indictment charged, and the evidence showed, a conspiracy merely to give and receive

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[12] Petitioners' related contention—that their offense, if any, consisted of violating Section 136 of the Criminal Code, *supra*, p. 4 (the special conspiracy statute dealing with conspiracies to influence jury verdicts) rather than Section 37, *supra*, p. 3 (the general conspiracy statute providing for the punishment of any conspiracy to commit an offense against the United States or to defraud the United States)—is, we think, adequately disposed of by the court below (see R. 2193-2194), which was unanimous on this point. "Section 136 and Section 37 may overlap," as the court below observed (R. 2193), "but neither was intended to repeal or supersede the other." Petitioners, in any event, can scarcely complain of having been prejudiced by being prosecuted under Section 37 rather than Section 136, since the maximum prison sentence imposable under the latter section was thrice the two-year maximum fixed by the former (though a lower maximum fine ($5,000) was fixed by Section 136 than by Section 37 ($10,000)).

There is no conflict, as claimed by petitioners (Burton Pet. 32; Cawthorn Pet. 26), between the decision below and *Enfield* v. *United States*, 261 Fed. 141 (C.A. 8). In the latter case, it was concluded, from the *express language* of Section 4 of the Espionage Act of 1917, 40 Stat. 219 (providing the same penalty for conspiring to violate either § 2 or § 3 of that Act as was fixed by the particular section whose violation was contemplated by the conspiracy, but providing that conspiracies to violate any other section of the Act should be punished under the general conspiracy statute, *i.e.*, Criminal Code, § 37), that "this section [*i.e.*, § 4 of the Espionage Act] was expressly intended to replace section 37 [of the Criminal Code] in those cases to which it is applicable" (261 Fed. at 142).

a bribe and actual commission of the substantive offense, the indictment should have been dismissed as to him (LaBranche Pet. 8-17). The contention is clearly without merit.

The indictment does not charge the substantive offense of giving or receiving bribes nor a conspiracy to give or accept bribes, but rather, in the language of the analogous *Manton* case, 107 F. 2d 834, 839 (C.A. 2), certiorari denied, 309 U.S. 664, "a conspiracy to obstruct justice and defraud the United States, the scheme of resorting to bribery being averred only to be a way of consummating the conspiracy and which, like the use of a gun to effect a conspiracy to murder, is purely ancillary to the substantive offense." Cf. *Glasser* v. *United States,* 315 U.S. 60, 66-67.

The mere fact that the bribery of LaBranche was consummated, as shown by the evidence, did not serve to merge the conspiracy with the accomplished crime of bribery. *Pinkerton* v. *United States,* 328 U.S. 640, 644. A similar contention was squarely rejected in the jury tampering case of *Sneed* v. *United States,* 298 Fed. 911, 913 (C.A. 5), certiorari denied, 265 U.S. 590, which was cited with approval on this point in the *Pinkerton* case.[13]

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[13] In the *Pinkerton* case, the Court stated: "Moreover, it is not material that overt acts charged in the conspiracy counts were also charged and proved as substantive offenses. As stated in *Sneed* v. *United States, supra,* p. 913, 'If the overt act be the offense which was the object of the conspiracy, and is also punished, there is not a double punishment of it.' The agreement to do an unlawful act is even then distinct from the doing of the act."

United States v. *Zeuli,* 137 F. 2d 845 (C.A. 2), cited as being in conflict with the decision below, is clearly distinguishable. The conspiracy there charged was a conspiracy to steal gasoline ration books and convert them, knowing their stolen character. The defendant's conviction was reversed because, though he knew the ration books were stolen, there was no evidence connecting him with the theft. Here, on the other hand, the evidence showed that LaBranche discussed the conspiracy and contemplated bribery with Oliveira even before he was accepted as a juror (R. 559), negotiated with Cawthorn through Oliveira in fixing the amount of the bribe (R. 563), knew that Burton had authorized the bribe and its amount (R. 566), and actually received the bribe money (R. 573). Plainly, LaBranche was intimately connected with, and a member of, the conspiracy from the outset. Also inapposite here is *United States* v. *Dietrich,* 126 Fed. 664 (C. C. D. Neb.), another case relied on by LaBranche (Pet. 11). There the agreement to give and receive the bribe was between two persons only, the giver and the receiver, and this point was the crux of the decision that, this agreement being of the essence of the substantive offense of bribery, it could not be made the basis for a conspiracy charge.[14] Here,

[14] See *United States* v. *Glasser,* 116 F. 2d 690, 696 (C.A. 7), affirmed in part (on this point, 315 U.S. at 67) and reversed in part, 315 U.S. 60, holding the *Dietrich* case not in point as authority for the same contention as is here made by petitioner LaBranche.

however, the conspiracy was to obstruct the administration of justice and defraud the United States of its right to an honest and unbiased jury, and LaBranche was but one member, though a key one, of the conspiracy, which also included, at least, Burton, Cawthorn, Oliveira, and Astorias.

CONCLUSION

The judgment below is correct, and there is no real conflict of decisions. We therefore respectfully submit that the petitions for writs of certiorari should be denied.

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DECEMBER 1949.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 417

JOE T. CAWTHORN,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF OF PETITIONER JOE T. CAWTHORN

I

By discussing the facts (Resp. Br., 4-11) without any effort to distinguish between the case which the prosecution presented against the petitioner Cawthorn and the case which it presented against the other defendants, the respondent has avoided the embarrassing necessity of explaining what happened to the prosecution's case against the petitioner Cawthorn when Oliveira, its cornerstone, was proved by mathematical demonstration to have perjured himself concerning the occurrence of the two key conferences in the alleged conspiracy (see Cawthorn Pet., 9-13).

By discussing the facts (Resp. Br., 5-8) as if the defendant Noe were guilty of the accusations levelled against him, without any effort to evaluate the effect of his acquittal by the jury, the respondent avails itself of the prejudicial atmosphere which was injected into the case by the inclusion of Mr. Noe as a defendant.

By the time a case reaches this court, all of the confusion, inherent in a conspiracy indictment, about who did what and the prejudice and atmosphere which the jury takes with it into the privacy of its deliberations should be eliminated, and this question should be squarely faced: What has been proven against this petitioner? If that question were fairly met, the answer would be not what the *acquitted* defendant Noe is alleged to have done, not what the petitioner Burton is alleged to have done, and not what the petitioner LaBranche is alleged to have done, but the complete absence of any credible evidence against the petitioner Cawthorn.

II

We do not find even an attempt on the part of the respondent to discuss the setting and the atmosphere in which this case was tried (see Cawthorn Pet., 7-9, 21) and the effect of the rulings of the Court on the jury in that atmosphere. We find no recognition that this was an extreme case, that the use of the *Allen* instructions, whatever justification therefor might exist in other cases, was coercive and prejudical in a situation where the freedom of the jurors to consider the evidence and decide the guilt or innocence of the defendants on the merits was restricted by the very nature of the issues under consideration.

III

An examination of the eleven pages devoted by the respondent to its attempt to justify the Trial Court's unjustifiable limitation of the cross-examination of the juror Adams, demonstrates the importance of the issues raised by the petition.

The question of whether or not a respected citizen and prominent lawyer shall be deprived of his liberty in a manner "contrary to common fairness as understood by every standard of American justice and due process of law" (2277) will not turn, we are certain, on such subtle arguments as are advanced in the respondent's brief.

For example, the respondent's argument in support of the Trial Court's ruling which limited cross-examination of the juror Adams is introduced with the contention that at the trial "the point at issue * * * was the propriety or impropriety of the question * * * as a cross-examination device for exploring the matter of the witness Adams' *memory and credibility* * * *" (Resp. Br., 13; Resp. italics). At another point in its highly technical argument in support of the Trial Court's ruling the respondent argues that "* * * the sole articulated point of dispute between defense counsel and the trial judge during the colloquy concerning the propriety of the controverted question sought to be asked Adams was the legitimacy of that line of questioning as a means of testing Adams' *memory and credibility* in respect of his direct testimony that the juror LaBranche had voted for acquittal throughout the jury's deliberations" (Resp. Br., 15; Resp. italics). Thereupon, in an astonishing footnote, respondent proceeds to prove that this was *not* the "sole articulated point of dispute between defense counsel and the trial judge", by pointing out very clearly

(Resp. Br., 15, footnote 4) that defense counsel stated (552): "* * * it would be most unfair to have it appear here now that LaBranche was the only one that voted that way" [without good reason and without good cause]. The bracketed words are omitted from respondent's brief but appear in the record as part of counsel's remarks.

The respondent contends in this footnote that "Whatever merit this point might have had, however, it was articulated at no other time during the colloquy, and it is manifest from a reading of the colloquy as a whole that it was never brought home to the trial judge as possibly a sound basis for the admissibility of the controverted line of questioning, distinct from its asserted relevancy as a test of the witness' memory and credibility."

Aside from the absurdity of respondent's suggestion that once a point is made by counsel, it must be "articulated" again, and perhaps, again in order to preserve the defendants' rights, it is completely beyond our power of comprehension to understand how anyone can claim that it is "manifest from a reading of the colloquy as a whole" that the experienced trial judge who presided at the trial of these defendants never had it brought home to him that the basis of defendants' proposed cross-examination of the witness Adams was to prove that LaBranche was not the only juror who voted for acquittal.

Counsel for the defendants at the outset of the colloquy (546) presented for the consideration of the Court the case of *Clark* v. *United States,* 289 U. S. 1. That case had nothing to do with the question of testing the memory of a witness by cross-examination. That case was discussed by counsel and by the Court as a case concerning the privilege of secrecy surrounding jurors' deliberations and the rule that no juror can impeach his verdict (546). In response to a question by the Court,

as to the effect of Mr. Justice Cardozo's opinion, counsel for the defendants stated:

> "He said in there that they could open the doors wide and throw whatever light was necessary that the jury trying the case should find out." (547).

Can it be argued now that the trial judge was not apprised, by this contention, that the defendants were trying to prove what went on in the Burton jury room in order to throw "whatever light was necessary that the jury trying the case should find out"?

The argument of defendants' counsel at the trial (547) then proceeded to a discussion of the case of *State* v. *Serpas,* 188 La. 1074, which had arisen in the State Court in the very jurisdiction where the trial below was held. That case too involved no question concerning the cross-examination of a witness to test his memory or credibility. In connection with the *Serpas* case also, counsel for the defendants in their argument before Judge Borah advocated the principle that "* * * the doors should be thrown wide open" (547). As a matter of fact counsel for the defendants (547-8) summarized his argument as follows:

> "Now, in this case, the Government has opened the doors, and I think it is important to show just exactly what happened, in full, in the jury room, and that is the way I read that case * * *."

Was this an argument that the defendants should be permitted to test the "memory and credibility" of the witness Adams? Does this colloquy indicate a failure on the part of the defendants' counsel to "articulate" his point of view?

The real reason why the argument shifted from the issues presented in the *Clark* and *Serpas* cases appears in the record but not in respondent's brief, for, at the conclusion of the argument of counsel for the defendants the prosecutor addressed the Trial Court (548-9) and asserted:

> "Now, you take the *Clark* case. That *Clark* case—I will cite some language to Your Honor. As I see it, you have two points. One is the question of privilege. *And I think, under the Clark case, it is very clear that in a situation such as this, the privilege is out the window.* But you do have a question of relevancy; and I think it is absolutely irrelevant for the defense to try to bring in what the other jurors did." (Italics ours.)

It was at this point, after the prosecutor had conceded that the "privilege is out the window", that counsel for the defendants for the first time, considering themselves beyond the issues raised in the *Clark* and *Serpas* cases, addressed themselves to the question of testing the witness' credibility and memory.

If there were any doubt at all concerning the issues raised before the Trial Court on this point, it must be dispelled by the opinion of the Court of Appeals (2196-7), which states:

> "On objection the court ruled that, *because of the juror's privilege*, it would be improper to ask how other particular jurors voted * * *. The juror's privilege and the exception when a juror is himself on trial for misconduct in connection with his service, were considered in *Clark*

v. *United States,* 289 U. S. 1. The ruling above recited was in accord with the *Clark* case." (Italics ours.)

Thus, what seems "manifest from a reading of the colloquy as a whole" to the respondent (Resp. Br., 15, footnote 4) is the direct contrary of what was perfectly "manifest from a reading of the colloquy as a whole" to the Court of Appeals. The respondent reads the entire colloquy and finds it relates solely to the question of testing Adams' memory and credibility. The Court of Appeals reads the very same colloquy and finds what is really there, namely, that the issue was the juror's privilege and the right of the Government to call a juror as a witness to testify to so much of what went on in the jury room as appears helpful to itself, and then cut off further inquiry, designed to show the whole picture, because such testimony is helpful to the defendants.

The present position of the respondent is ironical indeed when we consider the final colloquy (556) between Court and counsel after the witness Adams was excused from the stand:

> "Mr. Byrnes: I understand it is not necessary to reverse [reserve] a bill.
>
> The Court: Counsel is correct. As long as your position is known, the court feels you are protected under the rules."

IV

If anything is apparent from the respondent's brief, it is the fact that it is permeated with a desire to create a fetish out of the jurors' privilege, which this Court refused to do in the *Clark* case (289 U. S. 1) a refusal which ~~when~~ the prosecutor who tried the case clearly recognized when he threw the privilege "out the window" (549).

Mr. Justice Cardozo announced for this Court in the *Clark* case (at pp. 13-14):

> "But the recognition of a privilege does not mean that it is without conditions or exceptions * * *. Other exceptions may have to be made in other situations not brought before us now. It is sufficient to mark the one that is decisive of the case at hand."

Nothing could establish more effectively the fact that the petition in this case presents questions of importance in the administration of crimnal law in the federal courts, and a constitutional question concerning the limitation placed by the Trial Court upon the cross-examination of a witness produced by the prosecutor on the most vital issue in the case, than the following excerpt from the respondent's brief (p. 19):

> "Thus, the *Clark* case is square authority for the propriety of the Government's evidence in this case that the juror LaBranche held out for Burton's acquittal throughout the jury's deliberations, and, indeed, it was because of defense counsel's awareness of the *Clark* holding that

no objection was made at the instant trial to that evidence (see R. 546). But it is not authority, as petitioners and the dissenting judge below suppose (see R. 2276), for the further proposition that the defense was entitled to show, on cross-examination of the witness Adams, that jurors *other than LaBranche* also held out for Burton's acquittal." (Resp. italics.)

We cannot believe that such an unconscionable principle will find favor with this Court.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 417

JOE T. CAWTHORN,

Petitioner,

against

UNITED STATES OF AMERICA.

PETITION FOR REHEARING

Petitioner, Joe T. Cawthorn, respectfully prays that a rehearing be granted of his petition for a writ of certiorari in this cause and that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, affirming a judgment of conviction entered against the petitioner, and others, by the United States District Court for the Eastern District of Louisiana after a verdict by a jury (2168-71).

Jurisdiction

Rule 33, subdivision 2, of the rules of this court provides for the filing of a petition for rehearing of orders on petitions for writs of certiorari. The petition for a writ of certiorari herein was denied on January 9, 1950. By order dated January 21, 1950, this court extended petitioner's time to file a petition for rehearing to February 23, 1950.

Brief Statement of Grounds

This petition for rehearing is confined to substantial grounds available to petitioner although not previously presented. Those grounds are as follows:

a) That petitioner has been deprived of his liberty without due process of law in contravention of the Fifth Amendment to the United States Constitution.

b) That petitioner has been deprived of his right to trial by an impartial jury in contravention of the Sixth Amendment to the United States Constitution.

I

The petitioner was deprived of a trial by twelve jurors with a "mental attitude of appropriate indifference" as required by the United States Constitution (*United States* v. *Wood*, 299 U. S. 123, 146).

A brief consideration of the total effect created by the setting in which this case was tried and the serious errors committed by the trial court will demonstrate how the jury was compelled to surrender its true function as an impartial fact-finding body to become the mere instrumentality for rendering a verdict of conviction.

II

Originally the Government instituted a criminal tax prosecution against one William T. Burton. After two trial juries had disagreed, the Government indicted the petitioner, one of the attorneys who had represented Burton at his first tax trial. The indictment named as co-defendants James A. Noe, a former Governor of the State of Louisiana, one Marcel F. LaBranche, who had been a juror at the second Burton tax trial, and Burton himself.

The defendants were charged with conspiring to tamper with the juror LaBranche.

It did not take very long for certain extraneous, highly prejudicial matters to become very clear to the jury which was considering the case against this petitioner and his co-defendants. Judge Wayne G. Borah had presided at both of the Burton tax trials. He also presided at the trial of the case below. The prosecutor, with studied deliberation, elicited from one of his witnesses the following testimony:

> "Q. • • • Now Mr. Walmsley, will you please tell the jury how it happened that you discussed this case with agent Malone? A. You mean originally?
>
> Q. Originally? A. Mr. Malone came over to my office and said that he was a federal agent and that Judge Borah was asking him to go into the matter pertaining to the jury trial, and he wanted to ask me for some information pertaining to same • • •.
>
> Q. When you testified and you mentioned Judge Borah's name, did this agent say anything about an investigation being conducted by the Court, or anything like that? A. No, at the request of the Court. • • • •" (536).

On cross-examination, the witness recalled Malone's words as follows:

> "'I am here to make an investigation at the request of Judge Borah'" (542).

The testimony that Judge Borah had been responsible for instigating the investigation which resulted in the indictment and trial of the petitioner and his co-defendants was delivered in the presence of both Judge Borah and Mr. Malone, a Treasury agent. Malone did not take the stand to either deny or affirm it.

It is quite evident that Judge Borah either did or did not instigate the investigation. However, even if the judge had nothing whatever to do with starting an investigation of the second Burton trial jury, a Government witness was

permitted to create the harmful, and highly prejudicial, impression that he had. The trial judge permitted himself, in effect, to be presented to the jury below as having departed completely from the "attitude of unswerving impartiality" required of him by fundamental law (*Hunter* v. *United States,* 62 F. 2d 217, 220 [5th Cir., 1932]). The prosecutor deliberately created that impression and a Treasury agent sat by, adding credence, by his silence, to the witness' assertion.

The trial judge's "lightest word or intimation" is received by the jury with great deference and indeed "may prove controlling" (*Quercia* v. *United States,* 289 U. S. 466, 470), making it a "fundamental and essential rule of especial importance in criminal cases" that he avoid the "appearance of becoming the advocate of either one side or the other" (*Adler* v. *United States,* 182 Fed. 464, 472 [5th Cir., 1910]).

In *Gomila et al.* v. *United States,* 146 F. 2d 372, 373-4 (5th Cir., 1944), the court held:

> "A fair and impartial trial is guaranteed to every defendant, and fundamentally means a trial before an impartial judge and by an impartial jury. • • • [T]he court should be careful to preserve an attitude of impartiality and guard against giving the jury any impression that the court was of the opinion that defendant was guilty."

III

A juror was on trial, along with others, charged with having corrupted his oath and having sold out to the defendant in a criminal case. LaBranche stood before these jurors accused of a heinous crime because his alleged conduct as a juror at a previous trial apparently had caused the active intervention of the very judge who now presided at this trial. The judge's intervention could have conveyed to this jury only one impression, namely, his belief that the disagreement at Burton's second tax trial resulted

from the corruption of one or more members of the Burton tax jury by the defendant in that case or by his representatives. The jurors in this case could regard the judge therefore as nothing but a partisan, an advocate of one side of the controversy.

The serious errors of law committed by the trial court, which we are about to discuss, could not have failed to remove the last shred of "appropriate indifference" which this jury might have retained after the startling revelation that the judge sitting on the bench was responsible for the instigation of the investigation conducted by agents of the United States Treasury Department.

IV

The Government produced Leon Adams, one of LaBranche's fellow jurors, who testified on direct examination, in answer to a question put to him by the prosecutor, that LaBranche had voted for acquittal throughout the jury's deliberations in the second Burton tax trial (545). When counsel for the defendants sought to inquire how the other jurors stood (545-56), in order to establish that seven other jurors also voted for acquittal (2276), the trial court cut off the inquiry (552) and prevented the true and complete picture of the Burton tax trial jury's deliberations from being presented to this jury although the Government had tendered the issue and had presented a false, because distorted, view.

Chief Judge Hutcheson in the Court of Appeals below, dissenting from the refusal of that court to grant petitioner's application for a rehearing, characterized the trial court's ruling as follows:

> "This was highly prejudicial to defendants because by the limitation put on the cross-examination, the evidence of the government as to how LaBranche had voted was given great and peculiar significance and made perhaps to have overwhelming weight in the decision of the case.

> The *Clark* case [*Clark* v. *United States*, 289 U. S. 1], on which the court below relied, and on which our opinion was rested, does not support the ruling of the District Judge. It is to the contrary effect. • • • Here, under the *Clark* case, *supra*, it was certainly proper to inquire how LaBranche voted. But it was certainly equally proper for defendants, on cross-examination, to prove, as bearing on the inquiry, how the other jurors voted" (2276).

The conduct of the trial court was condemned by Chief Judge Hutcheson in the following language:

> "Indeed, to permit the government, as was done here, to offer a witness and then to deny defendant reasonable cross-examination of that witness is contrary to common fairness as understood by every standard of American justice and due process of law" (2277).

Judge Hutcheson was considering the effect of this ruling, just as we did in our original petition, as an isolated error in the exclusion of evidence which occurred in the course of a fairly lengthy trial. As we have demonstrated in this petition for rehearing, it was not only that but a great deal more. It was indeed another step in that combination of closely related circumstances which deprived this petitioner of his constitutional right to a fair and impartial trial.

For Judge Borah's ruling that the defendants could not prove by cross-examination how the other jurors stood was separated in point of time only by a recess for luncheon (543-4) from the revelation that Judge Borah had instigated the investigation of the Burton jury. The impact of this ruling and the preceding revelation on the jurors who heard the testimony of the witness Adams and pondered the implications which these events might hold for themselves, is not difficult to ascertain. If one of us votes for acquittal, these jurors could not help but reason, our vote may be the subject of an investigation ordered by the trial judge sitting up there; innocent though we may be, our vote may be proven as an important element of a

false accusation against us in a prosecution for jury tampering and we will not be permitted to defend ourselves by proving that other jurors were of the same mind, were affected by the evidence the same way that we were and voted the same way that we did. In this manner were the jurors who stood for acquittal effectively cut off from one another; a juror who might entertain a reasonable doubt concerning the guilt of the petitioner thus was completely isolated from a fellow juror who might share his opinion.

V

"Impartiality is not a technical conception. It is a state of mind" (*United States* v. *Wood,* 299 U. S. 123, 145).

The case against the petitioner went to the jury on the flimsiest basis imaginable. At the time fixed by the Government's main witness for the occurrence of two of the most crucial conversations relating to the alleged conspiracy, the petitioner, by overwhelming, uncontradicted testimony, proved that he was hundreds of miles from the alleged scene (see petition for writ of certiorari, pp. 9-12).

Another important witness for the Government—Astorias—did not even mention the petitioner's name, aside from stating that he knew him. A third witness for the Government—Walmsley—described a conversation with both the defendant Noe and the petitioner, asserting that both of them, he couldn't tell which, had made certain incriminating statements and assertions. The acquittal of the defendant Noe indicates that Walmsley's story was rejected by the jury.*

These facts are pertinent here only insofar as they tend to explain why the jury, at the end of twenty-five hours of deliberation, had failed to reach a verdict. One or

* For a more detailed discussion of the lack of credible evidence against the petitioner Cawthorn see the petition for a writ of certiorari, pages 9-17, inclusive.

more of the jurors must have entertained a reasonable doubt concerning the guilt of one or more of the defendants, despite the seriously prejudicial atmosphere in which the case had been tried. The innocence of the petitioner, although perhaps in itself no ground for the issuance of a writ of certiorari, was certainly well established on the record. A reasonable doubt concerning his guilt is the only conclusion a jury with a "mental attitude of appropriate indifference" could have drawn from this record.

At this stage of the proceedings the jury was called back by the trial judge and given supplemental instructions (1453) which Judge Borah announced (1454) had been approved by this court in the case of *Allen* v. *United States,* 164 U. S. 492. In the course of that charge the jury was instructed, among other things, that "if much the larger number" of the panel were for conviction a dissenting juror

> "should consider whether a doubt in his own mind is a reasonable one, which makes no impression upon the minds of so many men, equally honest, equally intelligent with himself, and who have heard the same evidence, with the same attention, with an equal desire to arrive at the truth, and under the sanction of the same oath" (1455).

In this charge the trial judge also advised dissenting jurors, if the majority were holding out for acquittal, to consider whether they ought not to doubt the correctness of their judgment which failed to carry conviction to the minds of their fellow jurors (1455).

The coercive effect of this charge in this particular setting is obvious. A member of the minority of the jury holding out for *conviction* would understand very well, from the circumstances of this case, that continuing to vote for conviction could not possibly arouse the hostility of the Government or suspicion concerning his motives and could not possibly lead to an investigation of his conduct instigated by the trial judge. On the other hand, a juror in the minority voting for *acquittal* could clearly foresee the sus-

picion and the hostility aroused in the minds of not only the prosecutor and the Treasury agents, but of the judge himself, who had been presented to them as having instigated the previous jury investigation. Thus the supplemental charge in this setting could be effective only upon those members of the jury who entertained a reasonable doubt concerning the guilt of the defendants.

Furthermore, by the supplemental charge, a juror who found himself among the minority voting for acquittal, was instructed that the majority of his fellow jurors who persisted in voting to convict

1) were equally honest with himself;

2) were equally intelligent with himself;

3) had heard the same evidence

   (a) with the same attention

   (b) with an equal desire to arrive at the truth

   (c) under sanction of the same oath.

The trial court voiced these unproven assumptions without any basis whatever for doing so and without any effort to substantiate them. While all of the jurors may have been equally honest and under the sanction of the same oath, the *Allen* case to the contrary notwithstanding, there was no proof that the jurors were equally intelligent, or that they had heard the evidence with the same attention,* or, what is most important, that they had heard the evidence with an equal desire to arrive at the truth.

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* Ram in "A TREATISE ON FACTS" (1870) states at p. 288 ff.:

> "On the jury assembled it will always be found, that one man hears better than another, has a quicker apprehension of what a witness says, understands it more readily, has a better memory, is less subject to absence of mind, keeps his mind more attentive to what is going on, wandering neither from habit, nor from any accidental noise or other chance incident in court. The superiority of one man implies the inferiority of another in these respects."

As we have already pointed out, the desire of some of these jurors "to arrive at the truth" had been seriously impaired, if not completely destroyed, by the revelation that Judge Borah had instigated the investigation which led to LaBranche's indictment and trial and by the manner in which the evidence concerning LaBranche's vote in the second Burton tax trial was adduced. To present a majority voting for conviction to the balance of the jury as sharing an equal desire "to arrive at the truth", at a time when they probably were concerned with nothing but a desire to convict and go home in order to avoid investigation by the court, did justice neither to the defendants nor to the facts.

Moreover, this unwarranted encomium of the attributes and qualities of the jurors who constituted a majority voting for conviction was followed by a laconic statement in which the trial court purported to be instructing a hypothetical minority holding out for conviction on their duty with regard to the majority standing for acquittal. Here no reference was made to the *honesty* of the majority voting for acquittal, no mention of their *intelligence,* no mention of the fact that they too were *attentive* to the evidence and had an equal desire to arrive at the *truth*—merely the terse admonition that a minority voting for conviction ought to ask themselves "whether they may not reasonably, and ought not to doubt the correctness of a judgment, which is not concurred in by most of those with whom they are associated, and distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their fellows" (1455).

In *Burton* v. *United States,* 196 U. S. 283, this court held that it was improper for the trial judge to couple the so-called *Allen* instructions with an inquiry directed to the jury concerning how they were divided numerically. To assume, however, that the only way a trial judge can ascertain how the jury stands in a criminal case is by direct inquiry of the panel, represents an utterly unrealistic approach to the problem. Any one with experience in the

trial of a criminal case knows that there are other ways of learning how a jury stands.* We do not know, and make no contention concerning, what occurred in this particular case. However, since information regarding how a jury stands may come to the trial judge (and an appellate court usually is not in a position to determine whether or not such information has been received) to entrust a trial court with any discretion at all in suggesting to the jurors that a minority standing either way might serve the ends of justice better by voting just the opposite, may make a complete mockery of the requirement that a defendant be accorded a fair and impartial trial.

Even if this court is not prepared to take an extreme position condemning the use of the *Allen* instructions in all criminal trials, it must be apparent that under the circumstances of this trial, regardless of whether the trial judge knew how this jury stood, the use of those instructions deprived this petitioner of his constitutional right to have his case judged on the merits by a jury which enjoyed a "mental attitude of appropriate indifference". If a mob clamoring for conviction had surrounded the courtroom, the "mental attitude" of these jurors could not have been very different. The cold fact that a conviction

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*In "YANKEE LAWYER, THE AUTOBIOGRAPHY OF EPHRAIM TUTT", the author, describing his experiences as a prosecutor in a case in the New York criminal courts, states (p. 99 ff.):

> "When the jury retired I followed them out into the corridor upon which their consultation room opened. Captain Gallagher, the court officer who had them in charge, was by this time an old friend of mine and, because I said I was tired, he brought me a chair and, having locked the door of the jury room, returned to court leaving me alone. Raucous sounds accompanied by a thin blue cloud drifted through the transom above. Placing the chair against the jamb of the door I was just able by standing on its back to peer through. Most of the jurymen had removed their coats and were sitting with their feet on the battered oak table shouting angrily at one another. I stood balancing myself on that chair back for nearly an hour. I do not pretend to record all that I heard, but only the more succulent fragments of ratiocination that stuck in my mind."

would be to the best interests of every juror who voted in the case was brought home by subtle as well as obvious methods. As they debated the issues of this case, the jurors could not fail to have uppermost in their minds not the question of whether the petitioner was guilty beyond a reasonable doubt, but the question of how their individual votes would affect their own future lives in the community in which the case was tried and in which they lived and worked.

It would take a courageous juror indeed to face, and overcome, this peril. That this jury failed to do so is no criticism of the jury system. It is a grave criticism, however, of a legal system which is content to voice such noble sentiments as "There is no right more sacred to our institutions of government than the right to a public trial by a fair and impartial jury; no wrong more grievous than its denial, and no greater duty is enjoined upon the courts than to preserve that right untarnished and undefiled" (*Baker* v. *Hudspeth*, 129 F. 2d 779, 781 [10th Cir., 1942]), while denying to this petitioner rights so eloquently proclaimed.

Apparently, only this court can infuse life into these fundamental principles. That the record of this case reveals such grave doubts concerning the guilt of the man who petitions this court for review adds a compelling note to a sacred obligation.

Wherefore, it is respectfully prayed that this petition for rehearing be granted and that the original petition be reconsidered and that a writ of certiorari be granted to bring before this court the divided decision and the judgment of the United States Court of Appeals for the Fifth Circuit.

February, 1950.

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Certificate

Counsel for petitioner certifies that this petition for rehearing is presented in good faith and not for delay and that the petition is restricted to substantial grounds available to petitioner, although not previously presented, one of the grounds specified in Rule 33, subdivision 2, of the Rules of this court.

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